

(23,043)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 538.

GRANT BROTHERS CONSTRUCTION COMPANY AND THE
UNITED STATES FIDELITY AND GUARANTY COM-
PANY OF BALTIMORE, MARYLAND, PLAINTIFFS IN
ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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a In the Supreme Court of the Territory of Arizona.

No. 1173.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation,
Appellant,

VS.

THE UNITED STATES OF AMERICA, Appellee.

A. C. Baker, Esq., Isidore B. Dockweiler, Esq., A. B. Baker, Esq.,
and F. C. Struckmeyer, Esq., for Appellant.

J. E. Morrison, Esq., United States District Attorney, and J. C.
Forest, Esq., Assistant United States District Attorney, for appellee.

On Appeal From the District Court of the First Judicial District of
the Territory of Arizona.

Be it remembered that on to-wit: the eleventh day of November,
1910, came the appellant in the above entitled cause, by its attor-
neys, and filed in the clerk's office of said court, in said entitled cause,
a certain Abstract of Record, in words and figures following, to-wit:

1 ABSTRACT OF RECORD.

Complaint.

In the District Court of the Second Judicial District of the Territory
of Arizona, Having and Exercising the Same Jurisdiction in All
Cases Arising Under the Constitution and Laws of the United
States as is Vested in the Circuit and District Courts of the United
States,

No. —.

THE UNITED STATES OF AMERICA, Plaintiffs,

VS.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation,
Defendant.

Petition.

Now comes the United States of America, by Joseph L. B. Alex-
ander, United States Attorney for the Territory of Arizona, and com-
plaining of the defendant, alleges:

2 For a First Cause of Action.

That the defendant Grant Brothers Construction Company is a
corporation, duly organized under the laws of the State of California,

and was, at all times hereinafter mentioned, engaged as a contractor in and toward the construction of railroads in the County of Cochise, in the Territory of Arizona.

Plaintiff further alleges that, in violation of the Act of Congress entitled, "An act to regulate the immigration of aliens into the United States," approved February 20, 1907, (contained in 34 Statutes at Large, at page 898) said defendant, on the 29th day of October, 1909, induced and solicited and caused to be induced and solicited one Benito Acuna, he being then an alien and a resident of and being in the State of Sonora, in the United States of Mexico, to migrate from the said United States of Mexico to the United States of America, (by offers and promises of employment) as a laborer in and towards the construction of a certain railroad then under the charge and management of the said Grant Brothers Construction Company, as contractor for the construction of said railroad in the County of Cochise, Territory of Arizona, United States of America, and that said Benito Acuna, (upon said offers and promises of employment) as aforesaid, migrated from the United States of

3 Mexico to the United States of America, entering the United States of America at Naco, Cochise County in the said Territory of Arizona, on the 29th day of October, 1909; and that said defendant Grant Brothers Construction Company assisted and encouraged and caused to be assisted and encouraged the importation and immigration of the said Benito Acuna into the United States, and furnished conveyance and transportation and caused to be furnished conveyance and transportation to said Benito Acuna, and paid and caused to be paid the expenses of his said trip from Hermosillo, State of Sonora, in the United States of Mexico, into Naco, Cochise County, Territory of Arizona, in the United States of America; that said Benito Acuna, at all the times herein mentioned was, and now is an unskilled laborer and not one of the classes of persons exempted under the terms of the last two provisos contained in Section Two of the said Act of February 20, 1907.

Wherefore, plaintiff prays judgment against the said defendant for the sum of One Thousand Dollars.

(NOTE.—The complaint contains forty-five counts. Counts two to forty-five inclusive, are identical with count one, above printed in full, except that the name of the alien alleged to have been induced and solicited and caused to be induced and solicited by the defendant to migrate from the United States of Mexico to the United States of America is a different one in each count. In all other respects the forty-five counts are exactly identical. In each count damages are prayed in the sum of One Thousand Dollars. The names of the aliens in counts two to forty-five inclusive, are the following:)

- 4
- Count 2—Jose Acuna.
 - Count 3—Jose G. Arias.
 - Count 4—Susano Benitez.
 - Count 5—Daniel Cabezul.
 - Count 6—Nicolas Castaneda.

- Count 7—Martin Coronado.
Count 8—Francisco Corrales.
Count 9—Jesus Cota.
Count 10—Ramon Enriquez.
Count 11—Manuel Escobosa.
Count 12—Simon Espinosa.
Count 13—Teodoro Garcia.
Count 14—Alberto Gomez.
Count 15—Trinidad Gomez.
Count 16—Juan Maria Gonzales.
Count 17—Jesus Guevarra.
Count 18—Nicolas Hernandez.
Count 19—Felipe Jimenez.
Count 20—Eustaquio Leyva.
Count 21—Julian Leyva.
Count 22—Andres Lopez.
Count 23—Ricardo Lopez.
Count 24—Alberto Luna.
Count 25—Francisco Lusania.
Count 26—Mariano Marin.
5 Count 27—Manuel Mejia.
Count 28—Donicio Nunez.
Count 29—Leocadio Parra.
Count 30—Manuel Peralta.
Count 31—Rumaldo Peraza.
Count 32—Gumeriendo Portillo.
Count 33—Calixto Ramos.
Count 34—Eduardo L. Revera.
Count 35—Juan Rodriguez.
Count 36—Alberto Ruiz.
Count 37—Francisco Salazar.
Count 38—Manuel Tona.
Count 39—Abelardo Torres.
Count 40—Manuel Valencia.
Count 41—Augustin Valenzuela.
Count 42—Antonio Vernal.
Count 43—Francisco Vidal.
Count 44—Eulalio Zamora.
Count 45—Pedro Zepeda.

Wherefore, plaintiff prays judgment against defendant in the sum of Forty-five Thousand Dollars, together with plaintiff's costs and disbursements herein incurred.

(Signed) JOSEPH L. B. ALEXANDER,
United States Attorney for the Territory of Arizona.

Filed in the U. S. District Court of the Second Judicial District,
December 22, 1909.

Filed in the U. S. District Court of the First Judicial District,
May 9, 1909.



Demurrer and Answer.

[Title of Court and Cause.]

And now comes the said defendant, Grant Brothers Construction Company, a corporation, by A. C. Baker, and Isidore B. Dockweiler, its at-orneys, and answering separately and severally each cause of action in said complaint contained, demurs thereto, and for cause of demurrer alleges:

That the said several causes of action in the said complaint stated do not state facts sufficient to constitute a cause of action; nor does any or either of the said several causes of action, in said complaint contained, state facts sufficient to constitute a cause of action.

And of this the defendant prays the judgment of the court:

(Signed)
(Signed)

A. C. BAKER,
ISIDORE B. DOCKWEILER,
Attorneys for Defendant.

If the above and foregoing demurrer be overruled, then, the defendant answering each and every of the several causes of action of the complainant's complaint herein, denies generally and specifically each and every allegation of each and every of the several causes of action in the said complaint contained.

And of this the defendant puts itself upon the country.

7 Wherefore the defendant prays judgment that the plaintiff take nothing by its action, or by any or either of the several supposed causes of action in said complaint stated, and that the defendant recover its costs in this behalf expended.

(Signed)
(Signed)

A. C. BAKER,
ISIDORE B. DOCKWEILER,
Attorneys for Defendant.

Filed in the U. S. District Court of the Second Judicial District,
Jan. 29, 1910.

Filed in the U. S. District Court of the First Judicial District,
May 9, 1910.

Motion for Change of Venue.

[Title of Court and Cause.]

And now comes the defendant Grant Brothers Construction Company, a corporation, by A. C. Baker and Isidore B. Dockweiler, its attorneys, and moves the court for a change of venue of this action, and in support of said motion herewith submits to the court, and files, the attached affidavit of James A. Cashion, vice-president and general manager of the said defendant corporation.

(Signed)
(Signed)

A. C. BAKER,
ISIDORE B. DOCKWEILER,
Attorneys for Defendant.

Filed in the U. S. District Court of the Second Judicial District,
March 24, 1910.

8 Filed in the U. S. District Court of the First Judicial District,
May 9, 1910.

Affidavit in Support of Motion for Change of Venue.

[Title of Court and Cause and Venue.]

Affidavit of James A. Cashion, vice-president and general manager of the defendant states:

That he makes this affidavit as such officer for the defendant; that he has cause to believe and does believe that on account of the bias or prejudice of the Honorable Fletcher M. Doan, the justice presiding in the District Court of the Second Judicial District of the Territory of Arizona, the defendant cannot obtain a fair and impartial trial of this action before the said justice.

Depositions.

Six notices, with interrogatories attached, to take the depositions of Miguel Zazueta, Alberto Ruiz, Manuel Escabosa, Jesus Gevuarra, Mateo Ortiz and Manuel Tona. The notices are as follows:

9 In the District Court of the Second Judicial District of the Territory of Arizona, Having and Exercising the Same Jurisdiction in All Cases Arising under the Constitution and Laws of the United States as is Vested in the District and Circuit Courts of the United States.

UNITED STATES OF AMERICA, Plaintiff,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation,
Defendant.

To Grant Brothers Construction Company, or A. C. Baker and I. B. Dockweiler, its counsel of record:

You are hereby notified that six days after the service of this notice and the attached interrogatories upon you, the above named plaintiff will apply to the clerk of the above entitled court for a commission to take the deposition of Miguel Zazueta, who resides and is to be found in the city of Hermosillo, United States of Mexico, in answer to the attached interrogatories, said deposition to be used upon the trial of the above entitled case.

Dated Bisbee, Arizona, April 16, 1910.

J. E. MORRISON,
Attorney for Plaintiff.

10 The six notices are alike with the exception of the names of the witnesses, separate notices and interrogatories being served for each witness.

All the notices are endorsed: "Service acknowledged, April 22nd, 1910, A. C. Baker, I. B. Dockweiler, Attorneys for defendant."

Filed in the U. S. District Court of the First Judicial District, Territory of Arizona, April 27, 1910.

Six commissions issued by the clerk of the District Court of the First Judicial District, Territory of Arizona, to any Notary Public, Minister, Commissioner, Charge d'affaires, etc., resident of the United States of Mexico, to take the deposition- of the witnesses stated. Issued May 5, 1910.

Depositions returned to and received by the clerk of the District Court, First Judicial District, Territory of Arizona, May 20, 1910. Depositions returned in six separate envelopes. The writing and endorsements on all are alike with the exception of the name of the witness. The following is a photographic facsimile thereof showing the endorsements and manner of return:

(Here follows facsimile marked pages 11 and 12.)

(11)
FRONT

opened at the request of the
 Attorney A. C. Parker acting for
 agent - May 23-1910
 account of James Clark
 James R. Dumas
 J. R. Dumas

AMERICAN CONSULATE
 HERMOSILLO, N.M.

Filed June 3-1910

James R. Dumas
 Attorney
 Deputy Clerk

3178

1706

Part of the District Court
 Judicial District of Arizona
 Tucson
 Arizona





United States of America
Grant Pass Construction Co

Miguel Zarzuela

(12)

BACK.



Luis H. Acosta
Am. Consul



No. B-87.

Received from the Post Office
at Tucson, Ariz., and
filed this 20th day of
May, A. D. 1910.
B. J. Jones, clerk



13 The depositions contain a copy of the notices served and filed April 27, 1910, shown above, and interrogatories and answers attached. The interrogatories and answers are abstracted in the bill of exceptions, as introduced at the trial. The depositions are certified to by Louis Hostetter, American Consul. All the certificates are alike with the exception of the names of the witnesses. The certificates are as follows:

"UNITED STATES OF MEXICO,
City of Hermosillo, ss:

I, Louis Hostetter, Consul of the United States of America in and for the district of Hermosillo, Sonora, Mexico, and residing in the city of Hermosillo, Sonora, United States of Mexico, do hereby certify that the foregoing ten interrogatories were propounded by me to the witness Miguel Zazueta and that the foregoing answers and all thereof were given by said witness and were by me reduced to writing and I further certify that all the said answers were sworn to and subscribed by said witness before me as said consul; I further certify that I am familiar with and conversant with both the Spanish and English languages and that I correctly interpreted said interrogatories into Spanish to the said witness, and correctly translated the answers of the said witness into English and that the above answers are a correct translation of the answers of the said witness.

14 In witness whereof I have hereunto set my hand and affixed my seal of office at Hermosillo, Sonora, Mexico, this 17th day of May, 1910.

[American Consular Seal.]

LOUIS HOSTETTER,
Consul of the United States of America."

Notice and Motion to Suppress Deposition.

In the District Court of the First Judicial District of the Territory of Arizona, Having and Exercising the Same Jurisdiction in All Cases Arising Under the Constitution and Laws of the United States as is Vested in the Circuit and District Courts of the United States.

[Title of Cause.]

To J. E. Morrison, Attorney for the Plaintiff:

Please take notice that on June 1, 1910, at the opening of court or as soon thereafter as counsel can be heard, I shall present to the Honorable John H. Campbell, Judge of said Court in the court rooms usually occupied by him, for disposition, a motion, a copy of which is herewith served upon you.

15 Dated Phoenix, May 26, 1910.

(Signed)

(Signed)

A. C. BAKER,

I. B. DOCKWEILER,

Attorneys for Defendant.

Motion.

[Title of Court and Cause.]

And now comes the defendant, by its attorneys, and moves the court to suppress, exclude, and strike from the files in the above entitled action the depositions of Alberto Ruiz, Manuel Escobosa, Manuel Tona, Miguel Zazueta, and Mateo Otiz, now on file therein, and objects to the reading in evidence of the said depositions, and in support of said motion specifies the following reasons, therefor:

1. The commissions to take the depositions of the said witnesses were issued without any notice with copy of the interrogatories attached, having been theretofore given by the plaintiff to the defendant or its attorneys of record, as required by Section 2507 of the Revised Statutes of Arizona, 1901.

2. Notices, with copies of the interrogatories attached, were served upon the attorney for the defendant on April 22nd, 1910, which said notices purported to notify the defendant that the plaintiff would apply to the clerk of the District Court of the Second Judicial District of the Territory of Arizona for commissions to take the depositions of said witnesses in this action, as appears more fully from the notices, with copy of the interrogatories attached, now on file in this court in this action, which said notices were the only notices served upon the defendant or its attorneys of record for the issuance of the commissions to take the depositions of said witnesses, and that as appears by the record of this action, at the time of the service of the said notices, with copy of the interrogatories attached, this action was not then pending in the District Court of the Second Judicial District of the Territory of Arizona, but had theretofore, by an order for a change of venue of this action entered by the said District Court of the Second Judicial District of the Territory of Arizona, been transferred, and the venue of this action changed, to the District Court of the First Judicial District of the Territory of Arizona, and the defendant had, prior to the service of the said notices, and within five days of the entry of said order, given an undertaking to the plaintiff and sureties approved by the Clerk of said court to the effect that it would pay all costs that may be adjudged against it in this action, and had prior to the service of the said notices paid to the Clerk of the District Court of the Second Judicial District of the Territory of Arizona all

17 costs for the transcript of the proceedings in this action, and that therefore the said notices are not a notice upon which the commissions could lawfully issue out of the District Court for the First Judicial District of the Territory of Arizona, and that said notices did not authorize and warrant the Clerk of the District Court of the First Judicial District of the Territory of Arizona to issue a commission to take said depositions.

3. That the said depositions appear upon their face not to have been properly taken as required by law, nor are the same attested as required by law.

4. That the said depositions were not properly returned into court in accordance with, and as required by, Section 2520 of the Revised Statutes of Arizona, 1901.

A. C. BAKER,
ISIDORE B. DOCKWEILER,
Attorneys for Defendant.

Filed May 27, 1910.

Certificate of American Consul, American Consular Service.

HERMOSILLO, SONORA, MEXICO, May 28, 1910.

This is to certify that the attached receipt was issued by the
18 Post Office of the city of Hermosillo, State of Sonora, United States of Mexico, and that the registry numbers therein mentioned were and are the same numbers which the said Post Office placed upon the envelopes, which envelopes contained all the depositions taken before me in the case of the United States of America vs. Grant Bros. Construction Company taken on the 16th and 17th of May, 1910. And that I personally delivered all of said envelopes containing all of said depositions to the said Post Office, addressed to the Clerk of the District Court for the First Judicial District of Arizona, at Tucson, Arizona, and caused the same to be registered by said Post Office on the 17th day of May, 1910.

In witness whereof I hereunto set my hand and Official seal the day and year first above written.

(Signed)

LOUIS HOSTETTER,
American Consul.

[American Consular Seal.]

Receipt Attached.

"Recibo de Deposito de certificados para paises de la Union Postal Universal.

Administracion de Correos Hermosillo, Sonora, Certificado num.
1701-707. Lla sido admitida hoy a certificacion Siete piezas
19 dirigida a Clerk of the District Court Tucson, Ariz. que remite American Consul.

Mexico, Mayo 17 de 1910.

Firma del Empleado,

JOSE V. TORRES.

[Seal: Certificados. May 17, 1910. Hermosillo, Son.]

Filed: June 1, 1910.

Affidavit of Non-Residence of Witnesses.

[Title of Court and Cause and Venue.]

Affidavit of J. E. Morrison, states that he is United States attorney and attorney for the plaintiff; that the witnesses Mateo Ortiz, Jesus

Guervarra, Alberto Ruiz, Manuel Escobosa, Manuel Tona and Miguel Zazucta are without the limits of the First Judicial District and more than fifty miles from the place of trial of this cause.

Signature and verification.

Filed: June 2, 1910.

Instructions Requested by Plaintiff.

(Filed June 7, 1910.)

The jury are instructed that if they are clearly satisfied from the evidence that the defendant corporation, Grant Brothers Construction Company, knowingly assisted, encouraged or solicited the migration or importation of any or all of the persons named and described in any or all of the separate causes of action set forth in the complaint in this case; and if they further believe from the evidence that any or all of the persons so named in said complaint were at the time of such assistance, encouragement and solicitation alien laborers, they should by their verdict find for the plaintiff, United States of America, in the sum of one thousand dollars for each and every one of such persons so named in said complaint and so knowingly induced, assisted and encouraged by the defendant corporation.

Endorsed: Given as modified.

JOHN H. CAMPBELL, *Judge.*

The jury are further instructed that the amount of the penalty provided by law in this case is not in any way a matter which should influence you in determining the facts of the case. The wisdom or lack of wisdom of Congress in adopting such regulation is not
21 such matter as can properly come within the purview of the jury's consideration. The fact that the law states that the penalty is one thousand dollars for each violation thereof settles the question of the amount for each of such violations finally and the fact that such penalty is in the amount of one thousand dollars should not be considered by the jury in any way in arriving at a determination of the facts in this case.

Endorsed: Given as modified.

JOHN H. CAMPBELL, *Judge.*

All corporations necessarily act through their officers and agents. All acts performed by duly authorized agents of a corporation are binding upon the corporation. All acts done by agents or servants of corporations, even when without the apparent scope of the authority of such officers and agents, if ratified and acted upon by the corporation, with knowledge that such officers, in performing such acts, did so without the direct authority of the corporation, are binding upon the corporation.

Endorsed: Given as modified.

JOHN H. CAMPBELL, *Judge.*

You will observe that the statute covering the case now before you for consideration, makes it a necessary condition that the acts and things charged to have been done by the defendant herein must have been knowingly done by such defendant. The court instructs you, however, that the word knowingly, as it appears in the Statute, is used in its ordinary sense, and it should by you be given the same interpretation that it receives in its ordinary acceptation.

In this case, it is not essential that the government should bring positive evidence here to show, or to have somebody swear that the corporation, itself or acting through its president, vice president and general manager, secretary, treasurer or board of directors, actually and personally took part in the offers, inducements and solicitations made to the persons named in the complaint herein, or any of them, if you believe from the evidence that such inducements, offers and solicitations were made to the persons named in the complaint or any of them, nor is it necessary that it should be admitted by any of the officers or agents of the defendant corporation that they knew that any such offers, inducements or solicitations were made as charged in the complaint, but it is incumbent on the Government to prove not only that the persons named in the complaint, or some of them, were alien laborers and actually entered the United States of America from the United States of Mexico, as a result of offers, inducements and solicitations so charged to have been made, but some circumstance which would warrant the inference that such corporation and its officers and authorized agents, knowingly encouraged and permitted it to be done.

In other words, if the Government proves facts and circumstances which clearly satisfy you that the corporation, through its officers and authorized agents, knew that such offers, inducements and solicitations would likely be made and encouraged and permitted the making thereof knowing that such persons, or any of them, would likely be induced to come to the United States of America from the United States of Mexico, as a result of such offers, inducements and solicitations, then you could properly say that the defendant corporation knowingly made the offers, inducements and solicitations charged in the complaint, if you believe from the evidence that such offers, inducements and solicitations were so made and that the persons named in the complaint, or some of them, were alien laborers and came from the United States of Mexico to the United States of America, as a result of the making of such offers, inducements and solicitations.

Endorsed: Given as modified.

JOHN H. CAMPBELL, *Judge.*

Where knowledge is an essential ingredient of a cause of action the existence of the knowledge becomes a question to be determined by the jury upon a consideration of all the facts and circumstances in the case.

Endorsed: Given as modified.

JOHN H. CAMPBELL, *Judge.*

Instructions Requested by the Defendant.

(Filed June 7, 1910.)

You are instructed that the burden of proof in this case is upon the plaintiff. The plaintiff must establish and prove the allegations of its complaint. It is not necessary for the defendant to disprove the acts with which it is charged. It is presumed to be innocent, and it is incumbent upon the plaintiff to prove the commission of the acts with which the defendant is charged, and unless you are satisfied in your own mind, from all the evidence, introduced at the trial, that the defendant did the acts complained of, your verdict must be for the defendant.

Endorsed: Given.

JOHN H. CAMPBELL, *Judge.*

You are instructed that the plaintiff must prove and establish the allegations of its complaint as to each and every count therein, and the several facts which you must find as proven relate to each and every count of the complaint, and if you find from the evidence that the plaintiff has failed to establish the allegations of any
25 one or either of the counts of the complaint, then, as to such count or counts, you must find the issues for the defendant. It is not sufficient for the plaintiff to entitle it to recover upon all the counts of the said complaint, unless each and every count be proved.

Endorsed: Refused.

JOHN H. CAMPBELL, *Judge.*

The court instructs the jury that this action is brought by the plaintiff for the purpose of recovering a penalty as a punishment for the alleged commission of a crime by the defendant, and in order to entitle the plaintiff to recover said penalty, the legal evidence introduced at the trial all taken together must be such as clearly satisfies you of the truth of the acts with which defendant is charged. It need not be such as to exclude all doubt, but it should be such as to satisfy your minds and judgment that the defendant did or caused or procured the acts in question to be done, and, if, after weighing all the evidence introduced at the trial, both for the plaintiff and for the defendant, you are not clearly satisfied that the defendant caused or procured the acts in question to be done, then your verdict must be for the defendant.

Endorsed: Given as modified.

JOHN H. CAMPBELL, *Judge.*

28 You are instructed that the acts of assistance alleged in the complaint to have been rendered by the defendant to the forty-five Mexicans mentioned in the complaint are that the

defendant furnished or caused to be furnished conveyance and transportation to said Mexicans upon their trip from Hermosillo, State of Sonora, Mexico, into Naco, Arizona, and that it paid or caused to be paid the expenses of the said Mexicans of their trip from Hermosillo, State of Sonora, Mexico, into Naco, Arizona. No other acts of assistance are alleged and none others should be considered by you in arriving at your verdict, and unless you find from the evidence that either one or both of these acts of assistance are proved to have been knowingly rendered by the defendant to the said Mexicans, then your verdict must be for the defendant.

Endorsed: Refused.

JOHN H. CAMPBELL, *Judge.*

The Court instructs the jury, that to entitle the plaintiff to recover in this action it is necessary for the plaintiff to prove, first, that the defendant, Grant Brothers Construction Company, offered or promised employment to the Mexicans to perform labor in this country as claimed, and that such offer or promise of employment was made by an agent of the defendant who was duly authorized

27 to make such offer or promise of employment, or if made by an agent not duly authorized by the defendant, that the defendant, after becoming fully aware of and knowing that such offers and promises had been made, with full knowledge of the facts, ratified the unauthorized act of the agent making such offers or promises. Second, the plaintiff must prove that the Mexicans were induced and solicited by the defendant to migrate to the United States by such offers and promises of employment previously made to them. The inducing and soliciting to migrate must be proved to have been done by a duly authorized agent of the defendant, or if done by an agent not authorized, that the defendant knew that the Mexicans had been so offered and promised employment and had thereby been induced and solicited to migrate to the United States of America and with full knowledge of these facts ratified and approved the unauthorized acts of the agent. Third, the plaintiff must prove that the Mexicans actually migrated into or entered the United States of America in pursuance of such offers and promises, and fourth, the plaintiff must prove that the defendant rendered assistance to the Mexicans in their importation or migration; that is, that it did one of the things it is charged with having done, furnished or caused to be furnished conveyance or transportation, or paid or caused to be paid the expenses of the

28 Mexicans while so migrating into the United States of America. Each one of these facts must be proved by the plaintiff before it is entitled to recover, and if you find from all the evidence introduced at the trial that any one or either of these facts are not proved, then your verdict must be for the defendant.

Endorsed: Refused.

JOHN H. CAMPBELL, *Judge.*

You are instructed that, if at the time the defendant employed W. W. Carney to secure laborers for it in its construction camp, it instructed said W. W. Carney to only engage or hire laborers on the American side in Arizona, and not to hire or engage and laborers in Mexico, nor to make any offers or promises of employment of any kind to anyone in Mexico, and such instruction was given to said W. W. Carney in good faith by the defendant, then your verdict must be for the defendant, unless you should further find from the evidence that the defendant subsequently, with full knowledge of the fact that the forty-five Mexicans mentioned in the complaint had been offered or promised employment in Mexico, ratified the unauthorized act of said W. W. Carney or those under him and assisted the said Mexicans to migrate into the United States in the manner charged in the complaint.

Endorsed: Given as modified.

JOHN H. CAMPBELL, *Judge.*

29 You are instructed that a corporation is not liable criminally for the unauthorized acts of its subordinate agents or servants, unless such corporations participated in, assented to, or directed the commission of the act of its agent or servant, and though you may find from the evidence that one W. W. Carney, either himself or through C. F. Holler and Company, or through any employé or agent of said W. W. Carney and C. F. Holler and Company, did or committed acts in violation of the Immigration Laws of the United States, and while so doing such unlawful act or acts, purported and pretended to act as the agent or agents of defendant, nevertheless the defendant is not liable in this action for the unlawful acts of said W. W. Carney or for the unlawful acts of C. F. Holler and Company, unless the defendant authorized, participated in, or directed the commission of such unlawful act.

Endorsed: Given as modified.

JOHN H. CAMPBELL, *Judge.*

You are instructed that W. W. Carney or C. F. Holler and Company were not such agents of the defendant as to make the defendant liable in this action for the unlawful acts of said W. W. Carney or C. F. Holler and Company, unless the defendant participated in, assented to, or directed the commission of such unlawful

30 acts of said W. W. Carney or C. F. Holler and Company.

Endorsed: Refused.

JOHN H. CAMPBELL, *Judge.*

You are instructed that if you find, from the evidence, that one W. W. Carney or C. F. Holler and Company, or any partner, employé, or servant of said Carney or Holler and Company transported the Mexicans over a line or lines of railroad into the United States by means of passes, and if you further find that such pass

or passes were not furnished to said W. W. Carney or C. F. Holler and Company by the defendant, nor at the instance or request of the defendant, but were furnished to them by a railroad company or companies, then that fact does not prove the allegation in the complaint that the defendant furnished or caused to be furnished conveyance and transportation to the said Mexicans.

Endorsed: Given as modified.

JOHN H. CAMPBELL, *Judge.*

You are instructed that if you find from the evidence that W. W. Carney or C. F. Holler and Company paid the expenses of the said Mexicans on their trip from Hermosillo, in the State of Sonora,

31 Mexico, into Naco, Arizona, such payment does not establish or prove the allegations in the complaint that the defendant paid said expenses unless you further find, from the evidence, that the defendant authorized or directed or assented to the payment of such expenses, and agreed and promised to reimburse the said W. W. Carney or C. F. Holler and Company for said expenses paid by the said W. W. Carney or C. F. Holler and Company, upon the trip of the said Mexicans from Hermosillo, Mexico, into Naco, Arizona.

Endorsed: Given as modified.

JOHN H. CAMPBELL, *Judge.*

You are instructed that if W. W. Carney was engaged by the defendant as a special agent only, for the purpose of employing laborers, then you are instructed that any one dealing with him or his partners, employes, or agents, was put upon their guard as to the extent of his authority and was dealing with him at their own risk as to the extent of his authority. Third parties, in this case, the Mexicans, could not rely upon the agent's assumption of authority, but are to be regarded as dealing with the agent only to the extent of his powers and must at their peril observe that the act done by the agent is legally identical with the act authorized by the principal, and in this case, if you find, from the evidence, that W. W.

32 Carney had no authority from the defendant to engage or hire laborers, or to make any offers or promises of employment outside of the territorial limits of the Territory of Arizona, and the defendant did not ratify any hiring of Mexicans outside of the territorial limits, if said W. W. Carney, then your verdict must be for the defendant.

Endorsed: Refused.

JOHN H. CAMPBELL, *Judge.*

You are instructed that, if you find, from the evidence, that the Mexicans were hired and employed in Nogales, Arizona, to work for the defendant, and after being so hired and employed in Nogales, Arizona, the expenses and transportation of such Mexicans were paid and caused to be paid and furnished by the defendant from

Nogales, Arizona, to Naco, Arizona, although such trip was made over a line of railroad running through Mexico, still the prepayment of the transportation by the defendant from Nogales, Arizona, to Naco, Arizona, and the payment of the expenses of the Mexicans upon such trip, under such conditions, is not and was not a violation of the Immigration Laws.

Endorsed: Refused.

JOHN H. CAMPBELL, *Judge.*

You are instructed that if you find from the evidence that at the time the defendant employed W. W. Carney to secure
33 laborers for it in its construction camp the defendant specifically instructed said W. W. Carney not to hire or employ any laborers within Mexico nor to make any offers or promises of employment to any one within Mexico, then the law presumes that such instruction was given to said W. W. Carney in good faith and was to be observed by said W. W. Carney.

Endorsed: Refused.

JOHN H. CAMPBELL, *Judge.*

You are instructed that the defendant could not ratify the unauthorized act of any one pretending to act as the agent of the defendant in the making of offers or promises of employment in Mexico to laborers, unless it had full knowledge of the fact that such offer or promise of employment had been made in Mexico.

Endorsed: Refused.

JOHN H. CAMPBELL, *Judge.*

The Court instructs the jury that it was at all proper to employ alien Mexican laborers at Nogales, Arizona, or Naco, Arizona, who were already there and had not been induced or solicited to migrate there from Mexico or other foreign country by offers or promises
34 of employment, or in consequence of agreements, oral written or printed, expressed or implied, to perform labor for defendant in Arizona of any kind, skilled or unskilled.

Endorsed: Given.

JOHN H. CAMPBELL, *Judge.*

The Court instructs the jury that in order to find any verdict in favor of the plaintiff and against the defendant corporation, the jury must be satisfied from the evidence that a principal or responsible officer of defendant corporation, such as the president, vice president, secretary, general manager, assistant general manager, or superintendent or foreman in charge of the works, or foreman in charge of men and having the power of employing or discharging men knowingly assisted or knowingly encouraged or knowingly solicited the migration or importation of an alien Mexican contract laborer into the United States.

Endorsed: Given as modified.

JOHN H. CAMPBELL, *Judge.*

The Court instructs the jury that if the jury find a verdict in favor of the plaintiff and against the defendant corporation, such verdict cannot exceed in this suit the sum of One Thousand Dollars.

Endorsed: Refused.

35 The Court instructs the jury in order to find any verdict in favor of the plaintiff and against the defendant, the jury must find that the defendant corporation knowingly assisted or knowingly encouraged or knowingly solicited the migration or importation of an alien contract laborer into the United States.

Endorsed: Refused.

JOHN H. CAMPBELL, *Judge.*

Stipulation.

[Title of Court and Cause.]

It is stipulated and agreed by both plaintiff and defendant, in open court, that each and every instruction and each and every part of each instruction given by the Court to the jury on its own motion or at the request of the defendant is and are deemed excepted to by the plaintiff; and also that each and every modification made by the Court to instructions requested to be given by the plaintiff is deemed excepted to by the plaintiff; and that each and every refusal of the Court to give instructions requested by the plaintiff is deemed excepted to by the plaintiff; and that each and every instruction and each and every part of each instruction given to the jury by the Court of its own motion or at the request of the plaintiff is and are

36 deemed excepted to by the defendant; and also that each and every modification made by the Court to instruction requested to be given by defendant; is deemed excepted to by defendant; and also that each and every refusal of the court to give instructions asked for by the defendant is deemed excepted to by defendant; and that the foregoing stipulations shall be inserted in and deemed a part of the reporters' notes.

June 7, 1910.

Signatures of Counsel for Plaintiff and Defendant.

Verdict.

[Title of Court and Cause.]

We, the jury duly empanelled and sworn in the above entitled cause, upon our oaths do find for the government on the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth,

eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth, fortieth, forty-first, forty-second, 37 forty-third, forty-fourth, and forty-fifth counts and fix the amount of its recovery at Forty-Five Thousand Dollars, (\$45,000.00).

JOHN W. ESTILL, *Foreman.*"

Filed: June 7, 1910.

Judgment.

[Title of Court and Cause.]

This cause coming on to be heard on the second day of June 1910, the same being one of the days of the regular April, 1910, term of said Court, United States of America, appearing by Joseph E. Morrison, Esq., United States Attorney for the Territory of Arizona and Grant Brothers Construction Company, a corporation, appearing by Messrs. Isidore B. Dockweiler and A. C. Baker, on the complaint of plaintiff and the answer of defendant, was tried by the Court and a jury of twelve good and lawful men, duly sworn and impannelled to try said cause. Evidence, both oral and documentary, was introduced by the plaintiff, whereupon the plaintiff rested; evidence, both oral and documentary, was introduced by the defendant, whereupon defendant rested, the hearing and trial having been continued from day to day until the seventh day of June, 1910, on which last named date, the case being closed by both parties 38 was fully argued by respective counsel and, under proper instructions by the Court as to the law of the case, was submitted to the said jury for consideration and the said jury, on said Seventh day of June, 1910, retired in charge of properly sworn bailiffs to consider of their verdict and the said jury, on said Seventh day of June, 1910, having in their deliberations reached a verdict, returned into said Court their said verdict which was and is in words and figures as follows, to-wit:

[Title of Court and Cause.]

We the jury duly impannelled and sworn in the above entitled cause, upon our oaths do find for the government on the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth, fortieth, forty-first, forty-second, forty-third, forty-fourth, and forty-fifth counts and fix the amount of its recovery at Forty-Five Thousand Dollars, (\$45,000.00).

JOHN W. ESTILL, *Foreman.*"

39 Wherefore, it is ordered, adjudged and decreed that the plaintiff, United States of America, do have and recover of and from the defendant, Grant Brothers Construction Company, a corporation, the full sum of Forty-five Thousand Dollars (\$45,000.00) and its costs herein sustained, taxed at the sum of \$2,210.25.

Done in open court this seventh day of June, A. D. 1910.

JOHN H. CAMPBELL, *Judge.*

Filed June 8, 1910.

Motion for New Trial.

[Title of Court and Cause.]

Now, comes the defendant and moves the Court to set aside the verdict and judgment and to grant the defendant a new trial of the above entitled action, upon the following grounds:

1. That the Court erred in admitting evidence at the trial on behalf of the plaintiff.
2. That the Court erred in rejecting evidence at the trial offered by the defendant.
3. That the Court erred in charging the jury.
4. That the Court erred in refusing instructions to the jury asked for by the defendant.
- 40 5. That the Court erred in giving instructions asked for by the plaintiff.
6. That the evidence does not sustain the verdict or judgment.
7. That the verdict and judgment are contrary to the evidence.
8. That the verdict and judgment are contrary to law.

A. C. BAKER,
ISIDORE B. DOCKWEILER,
Attorneys for Defendant.

Filed: June 8, 1910.

Memorandum of Costs and Disbursements.

[Title of Court and Cause.]

Marshal's fees	\$29.65
Clerk's costs	148.90
Jury fees	180.00
Board and lodging of Jury	175.00

Detained alien witnesses 175 days at \$1.00 per day named as follows:

Jose Acuna	\$175.00
Nicolas Casteneda	175.00
Francisco Corrales	175.00
Ricardo Lopez	175.00
Gumerindo Portillo	175.00
41 Abelardo Torres	175.00
Gustavo S. Randall	175.00

\$1225.00 1225.00

Witnesses' fees:

Ramon Felix	37.80
Luis Sanchez	34.10
W. W. Carney	37.80
C. J. Ruppeldius	155.60
J. B. Collins	19.10
C. F. Holler	37.80
V. W. Bennett	28.80
Paulino Fontez	28.80
George O. Hilzinger	18.00
Conductor Wamsley	16.80
Railroad transportation detained alien witnesses above named from Naco to Tombstone and Tombstone to Tuc- son, \$5.30 each	37.10
Total	\$2210.25

J. E. MORRISON,

United States Attorney for the Territory of Arizona.

Filed: June 10, 1910.

Defendant's Exceptions to Bill of Costs.

[Title of Court and Cause.]

42 And now comes the defendant by its attorneys, and here-
with files its exceptions to the plaintiff's Statement of Costs,
and excepts as follows:

1. To the item of Board and Lodging of the Jury of \$175.00, for
the reason that the same is not authorized by law, and is exorbitant
and excessive;

2. To the item detained alien witnesses 175 days at \$1.00 per day,
named as follows:

Jose Acuna	\$175.00
Nicolas Casteneda	175.00
Francisco Corrales	175.00
Ricardo Lopez	175.00
Gumerindo Portillo	175.00
Abelardo Torres	175.00
Gustave S. Randall	175.00

\$1225.00

for the reason that the same is not authorized by law, and is exorbi-
tant and excessive;

3. To the item of Witnesses' Fees of Ramon Felix \$37.80 for the
reason that same is not authorized by law, and is exorbitant and ex-
cessive;

4. To the item of Witnesses' Fees of Luis Sanchez \$34.10, for

the reason that same is not authorized by law, and is exorbitant and excessive;

43 5. To the item of Witnesses' Fees of W. W. Carney, \$37.80, for the reason that the same is not authorized by law, and is exorbitant and excessive.

6. To the item of Witnesses' Fees of C. J. Ruppelius, \$155.60, for the reason that the same is not authorized by law, and is exorbitant and excessive.

7. To the item of Witnesses' Fees of J. R. Collins, \$19.10, for the reason that the same is not authorized by law, and is exorbitant and excessive.

8. To item of Witnesses Fees of C. F. Holler, \$37.80, for the reason that the same is not authorized by law and is exorbitant and excessive.

9. To the item of Witnesses Fees of V. W. Bennett, \$28.80 for the reason that the same is not authorized by law, and is exorbitant and excessive.

10. To the item of Witnesses Fees of Paulino Fontez \$28.80 for the reason that the same is not authorized by law, and is exorbitant and excessive.

11. To the item of Witnesses Fees of George O. Hilzinger, \$18.00, for the reason that the same is not authorized by law, and is exorbitant and excessive.

12. To the item of Witnesses Fees of Conductor Wamsley, \$16.80, for the reason that the same is not authorized by law and is exorbitant and excessive.

44 13. To the item of Railroad transportation detained alien witnesses above named from Naco to Tombstone and Tombstone to Tucson, \$5.30 each, totaling \$37.10, for the reason that the same is not authorized by law.

Wherefore, the defendant prays that the said items of costs above excepted to be disallowed.

A. C. BAKER,
ISIDORE B. DOCKWEILER,
Attorneys for Defendant.

Filed June 13, 1910.

Minute Entries in the District Court of the Second Judicial District.

October Term, A. D. 1910, Monday, April 18th, 1910.

APRIL 18, 1910.

Court convened and was duly opened by the officers according to law at 9:30 o'clock A. M. this being the 60th day of the term.

UNITED STATES OF AMERICA

vs.

GRANT BROS. CONSTRUCTION CO.

Order Granting Change of Venue.

45 The United States Attorney being present, comes now Ben Goodrich, Esq. counsel for the defendant and presents

motion for change of venue and the Court being fully advised in the premises grants said motion and orders case transferred to the First Judicial District for trial.

Certificate of A. H. Gardner, Clerk of the District Court of the Second Judicial District, that the foregoing is a true and correct copy of the order granting change of venue in said case.

Endorsements: U. S. District Ct. 1st. Jud. Dist. Territory of Arizona. Certified copy of order granting change of venue in the case of United States of America vs. Grant Bros. Construction Co. Filed May 9, 1910. Allen B. Jaynes, Clerk, by his deputy.

Certificate of the clerk of the District Court of the Second Judicial District, Territory of Arizona, that in the cause of United States of America, plaintiff, vs. Grant Brothers Construction Company, defendant, a bond of the defendant with sureties, was filed and approved by the clerk of said court on April 21st, 1910, and that the costs on said change of venue were paid by the defendant on said April 21st, 1910.

46 *Minute Entries in the District Court of the First Judicial District.*

UNITED STATES OF AMERICA

vs.

THE GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation,
Defendant.

Be it remembered, That heretofore and upon to wit: the twenty-fourth day of May, A. D. 1910, the same being one of the regular juridical days of the April 1910 term of said Court the following order, inter alia was had and entered of record in said court in said cause which said order is in words and figures as follows, to wit:

[Title of Cause.]

It is ordered that this cause be set for trial by jury on Thursday, June 2, 1910 at 9:00 o'clock A. M.

And afterwards and upon to wit: the second day of June A. D. 1910, the same being one of the regular juridical days of the April 1910 Term of said court, the following order, inter alia was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to wit:

[Title of Cause.]

47 This matter came on this day regularly to be heard upon the motions of the defendant to quash the depositions filed herein, J. E. Morrison, Esq., United States Attorney, present

on the part of the United States and A. C. Baker, Esq., and I. B. Dockweiler, Esq., appearing as counsel for the defendant. Argument of the respective counsel was had and the matter being fully submitted to the Court, the same was by the Court taken under advisement.

And afterwards, and upon to-wit:—the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

[Title of Cause.]

This case came on this day regularly for trial, J. E. Morrison, Esq., United States Attorney, and J. C. Forest, Esq., Assistant United States Attorney being present on the part of the United States and A. C. Baker, Esq., and I. B. Dockweiler, Esq., appearing for the defendant, and both parties announced ready for trial. Whereupon the Clerk was ordered to draw twenty names from the box wherein he had deposited in the presence of the Court the names of the jurors summoned and not excused and the names of twenty persons were thereupon drawn, and all answering thereto, respectively, took their places in the jury box. The said jurors were then duly

48 sworn and examined on their voir dire. Joseph A. Graf was thereupon challenged and excused for cause and the Clerk then drew from the box the name of D. H. Wyatt, who was duly sworn and examined on his voir dire. The panel being now full and complete and said jurors in the jury box having been passed for cause by both the plaintiff and the defendant, the respective parties exercised their right of peremptory challenge and the following named persons were called according to law to constitute the jury, viz:—Stanley J. Kitt, J. H. Huntsman, J. I. Toler, L. A. Lohse, John W. Estill, Louis DeVry, G. W. Pittock, R. B. O'Neill, E. G. Sporleder, R. L. Hornbrook, Chas. H. Olney and D. H. Wyatt who were duly sworn to well and truly try the issues joined between the plaintiff and the defendant herein. The United States Attorney then read the complaint to the jury and made a statement of the plaintiff's case to the jury and counsel for the defendant read the answer of the defendant to the jury. The plaintiff then, to maintain upon its part the issues herein, called as witnesses the following named persons, to-wit:—A. E. Burnett, J. R. Collins and George Lockwood, who were duly sworn, examined and cross-examined and also introduced certain documentary evidence and this being the usual hour for recess, the Court duly admonished the jury according to law and thereupon excused them to remain in charge of

49 Robert Millar, and Carmen Mungia, bailiffs, officers of this Court, first duly sworn for that purpose, until Friday, June 3, 1910, at 9:00 o'clock A. M. to which time the further trial of this case is now ordered continued.

And afterwards, and upon to-wit:—the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

[Title of Cause.]

It is ordered that the Marshal furnish to the jurors herein and their bailiffs, their meals and lodging during their deliberations herein.

And afterwards, and upon to-wit:—the third day of June, A. D. 1910, the same being one of the regular juridical days of the April 1910 Term of said Court, the following order, inter alia, was had and entered of record in said Court, in said cause, which said order is in words and figures as follows, to-wit:—

[Title of Cause.]

This case having been continued from yesterday's session of this Court, come now the same parties hereto, and come also the jurors here, in charge of their bailiffs sworn for that purpose, their names are called, and all answering thereto, respectively, the further trial of the case proceeds as follows:—The plaintiff, to
50 further maintain upon its part the issues herein, called as witnesses the following named persons, to-wit: Geo. O. Hilzinger, W. W. Carney, C. F. Holler, C. J. Ruppelius and J. C. Vinson, who were duly sworn, examined and cross-examined and also re-called as a witness A. E. Burnett, who was further examined and cross-examined, and also introduced certain documentary evidence and this being the usual hour of recess, the Court duly admonished the jury according to law and thereupon excused them, to remain in charge of their bailiffs until Saturday, June 4, 1910, at 9:00 o'clock A. M. to which time the further trial of this case is now ordered continued.

And afterwards, and upon to-wit:—the fourth day of June A. D. 1910, the same being one of the regular juridical days of the April 1910 Term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

[Title of Cause.]

This case having been continued from yesterday's session of this Court, come now the same parties hereto, and come also the jurors herein, in charge of their bailiffs, sworn for that purpose, their names are called, and all answering thereto, respectively, the further trial of the case proceeds as follows:—The plaintiff
51 then, to maintain upon its part the issues herein, recalled as a witness Geo. O. Hilzinger, who was further examined and cross-examined and also called as witnesses the following named persons to-wit: P. Fontes, D. W. Bennett, A. J. Wamsley, Ramon Felix, Ruiz Sanchez, Francisco Coralles, Rucardo Lopez, and Nicholas Castaneda, who were duly sworn, examined and cross-examined, the last five through James Hunter, an interpreter of the Spanish language first duly sworn for that purpose, and also introduced certain

written testimony, being the depositions of Miguel Zazueta, Alberto Ruiz, Manuel Escoboza, Jesus Guevarra, Mateo Ortiz, and Manuel Tona, and this being the usual hour of recess, the Court duly admonished the jury according to law and thereupon excused them to remain in charge of their bailiffs until Monday, June 6, 1910, at 9:00 o'clock A. M. to which time the further trial of this case is now ordered continued.

And afterwards, and upon to-wit the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

[Title of Cause.]

52 The motion of the defendant to suppress the depositions filed herein having been heretofore argued and duly submitted to the Court and the Court being fully advised in the premises, does deny said motion.

And afterwards, and upon to-wit:—the Sixth day of June, A. D. 1910, the same being one of the regular juridical days of the April 1910 Term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

[Title of Cause.]

This case having been continued from yesterday's session of this Court, come now the same parties hereto, and come also the jurors herein, in charge of their bailiffs, their names are called, and all answering thereto, respectively the further trial of the case proceeds as follows:—The plaintiff, to further maintain upon its part the issues herein, recalled as a witness A. E. Burnett, who was further examined and cross-examined, and also called as witnesses the following named persons, to-wit: Jose Acuna, A. Torres, Gumerindo Portillo, and Gustavus S. Randall, who were duly sworn, examined and cross-examined through James Hunter, an interpreter of the Spanish language, first duly sworn for that purpose, and also introduced certain documentary evidence and W. W. Carney was also recalled for the purpose of further cross-examination and
53 thereupon the government rested its case. And this being the usual hour of noon recess, the Court duly admonished the jury according to law and thereupon excused them, to remain in charge of their bailiffs until 2:15 P. M. On this day. It is further ordered that the further trial of this case be continued until 1:30 o'clock P. M. on this day.

And afterwards, and upon to-wit: the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

[Title of Cause.]

This case having been continued from a previous session of the present term of this Court on this day, the United States attorney being present, and I. B. Dockweiler, Esq. and A. C. Baker, Esq. appearing as counsel for the defendant, the trial of the case proceeds as follows: Counsel for the defendant moved the Court to strike from the records the testimony of W. W. Carney, C. F. Holler, C. J. Rupelius, Louis Sanchez and Ramon Felix, Argument of the respective counsel was had and the matter being fully submitted to the Court and the Court being fully advised in the premises, does deny said motion. Counsel for the defendant then moved the Court to

54 direct the jury to return a verdict for the defendant on all counts on the ground that the plaintiff has failed to establish any of the causes of action set out in the complaint. And said motion being fully submitted to the Court and the Court being fully advised in the premises, does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number one on the ground that the plaintiff has failed to establish that any offer or agreement express or implied was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises, does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number three on the ground that the plaintiff has failed to establish that any offer or agreement express or implied was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises, does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number four on the ground that the plaintiff has failed to establish that any offer or agreement express or implied was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises, does deny said motion. Counsel

55 for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number five on the ground that the plaintiff has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number seven on the ground that the plaintiff has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number nine on the ground that the plaintiff

has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number ten on the ground that the plaintiff has failed to establish that any offer or agreement, ex-

56 press or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to

the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number eleven on the ground that the plaintiff has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number twelve on the ground that the plaintiff has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number thirteen on the ground that the plaintiff has failed to establish that any offer or agreement, express or implied was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the

57 Court to direct the jury to return a verdict for the defendant on count number fourteen on the ground that the plaintiff has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the court to direct the jury to return a verdict for the defendant on count number fifteen on the ground that the plaintiff has failed to establish that any offer or agreement express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the court to direct the jury to return a verdict for the defendant on count number sixteen on the ground that the plaintiff has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number eighteen on the ground that the plain-

tiff has failed to establish that any offer or agreement express or implied, was made in Mexico by anyone representing the defendant.

And said motion being fully submitted to the Court and
58 the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number nineteen on the ground that the plaintiff has failed to establish that any offer, or agreement express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number twenty on the ground that the plaintiff has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number twenty-one on the ground that the plaintiff has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number twenty-four on the ground that the plaintiff

59 has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number twenty-five on the ground that the plaintiff has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number twenty-six on the ground that the plaintiff has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number twenty-nine on the ground that the plaintiff has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the
60 premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict

for the defendant on count number thirty on the ground that the plaintiff has failed to establish that any offer or agreement, express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number thirty-one on the ground that the plaintiff has failed to establish that any offer or agreement express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number thirty-three on the ground that the plaintiff has failed to establish that any offer or agreement express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number

thirty-five on the ground that the plaintiff has failed to
61 establish that any offer or agreement express or implied, was made in Mexico by anyone representing the defendant.

And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number thirty-six on the ground that the plaintiff has failed to establish that any offer or agreement express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number thirty-seven on the ground that the plaintiff has failed to establish that any offer or agreement express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number forty on the ground that the plaintiff has failed to establish that any offer or agreement express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court

and the Court being fully advised in the premises does deny
62 said motion. Counsel for the defendant then moved the

Court to direct the jury to return a verdict for the defendant on count number forty-one on the ground that the plaintiff has failed to establish that any offer or agreement express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for

the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number forty-two on the ground that the plaintiff has failed to establish that any offer or agreement express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion. Counsel for the defendant then moved the Court to direct the jury to return a verdict for the defendant on count number forty-three on the ground that the plaintiff has failed to establish that any offer or agreement express or implied, was made in Mexico by anyone representing the defendant. And said motion being fully submitted to the Court and the Court being fully advised in the premises does deny said motion.

And afterwards, and upon to-wit the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

63

[Title of Cause.]

This case having been continued from a previous session of the present term of this Court on this day, come now the same parties hereto, and come also the jurors herein in charge of their bailiffs, their names are called, and all answering thereto, respectively, the further trial of the case preceeds as follows:—Counsel for the defendant then made a statement of the defendant's case to the jury and the defendant then, to maintain upon its part the issues herein, called as witnesses the following named persons, to-wit: Angus Cashion, J. A. Cashion, John A. Burton, John R. Grant, J. E. McLean, Chas. E. Pearce, W. T. Taylor and D. R. McDonald, who were duly sworn, examined and cross-examined and thereupon the defendant rested its case. And this being the usual hour of recess, the Court duly admonished the jury according to law and thereupon excused them, to remain in charge of their bailiffs until Tuesday, June 7, 1910, at 9:30 o'clock, A. M. to which time the further trial of this case is now ordered continued.

And afterwards, and upon to-wit: the seventh day of June, A. D. 1910, the came being one of the regular juridical days of the April Term 1910 of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

64

[Title of Cause.]

This case having been continued from yesterday's session of this Court, come now the same parties hereto, and come also the jurors herein, in charge of their bailiffs, their names are called, and all answering thereto, respectively, the further trial of the case proceeds as follows:—Argument of the respective counsel was had and the

Court instructed the jury orally, the charge being taken down in shorthand by J. E. Larrabee, a phonographic reporter in attendance upon the trial, And said case being fully submitted, said jury retire in charge of Robert Millar and Carmen Mungia, bailiffs, officers of this Court, first duly sworn for that purpose, to consider of their verdict. And subsequently said jurors return into Court, in charge of said officers, their names are called and all answering thereto, respectively, upon being asked if they have agreed upon a verdict through their Foreman, report that they have agreed, and thereupon, through their Foreman, present their verdict. The Court then announced the verdict and inquired whether either party desired the jury polled, and counsel for the defendant desiring the jury polled, the Clerk called the name of each juror and inquired of him whether such was his verdict, and each juror replying in the affirmative, said verdict was ordered recorded as follows, to wit:—

65

[Title of Cause.]

We, the jury duly impanelled and sworn in the above entitled cause, upon our oaths do find for the government on the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, Twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirt'-eighth, thirty-ninth, fortieth, forty-first, forty-second, forty-third, forty-fourth, forty-fifth counts and fix the amount of its recovery at Forty-Five Thousand Dollars, (\$45,000.00).

JOHN W. ESTILL, *Foreman.*"

And the Clerk, inquiring of said jurors whether such is their verdict, they say that it is and so say they all. Whereupon said jury was ordered discharged from the case. And the jury herein having returned a verdict in favor of the Government and against the defendant, it is ordered that judgment be entered herein in favor of the United States of America and against Grant Brothers Construction Company a corporation for the sum of Forty-Five Thousand Dollars. (\$45,000.00) in accordance with said verdict. Whereupon counsel for the defendant herein excepted to the verdict and to the order of judgment.

66

And afterwards, and upon to-wit: the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

[Title of Cause.]

It is ordered that the Marshal furnish to the jurors herein and their bailiffs, their meals during the deliberations herein.

And afterwards, and upon to wit:—the eighth day of June, A. D. 1910, the same being one of the regular juridical days of the April 1910 Term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

[Title of Cause.]

Upon application of counsel for the defendant herein, the defendant is granted a stay of execution in this case until the disposition of the motion for a new trial filed by defendant herein.

And afterwards, and upon to-wit: the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

67

[Title of Cause.]

Upon application of J. E. Morrison, Esq., United States Attorney, the Government is granted leave to withdraw the exhibits filed herein for identification and the Clerk is ordered to deliver said exhibits to J. C. Vinson, taking his receipt therefor.

And afterwards, and upon to-wit: the ninth day of June, A. D. 1910, the same being one of the regular juridical days of the April 1910 Term of said Court, the following order, inter alia, was had and entered of record in said Court, in said cause, which said order is in words and figures as follows, to-wit:—

[Title of Cause.]

Upon motion of J. E. Morrison, Esq., United States Attorney, it is ordered that Jose Acuna, Nicholas Castaneda, Francisco Corrales, Ricardo Lopez, Gumercindo Portillo, Aberlardo Torres and Gustavo S. Randall, alien witnesses detained in custody by order of Court dated December 11, 1909, be and they are hereby released from custody.

And afterwards, and upon to wit:—The twenty-fourth day of September A. D. 1910, the same being one of the regular juridical days of the April 1910 Term of said Court, the following order, inter alia, was had and entered of record in said Court, in said cause, which said order is in words and figures as follows, to-wit:—

68

[Title of Cause.]

This matter came on this day regularly to be heard upon the defendant's exceptions to Cost Bill, J. E. Morrison, Esq., United States Attorney, appearing on behalf of the United States, and A. C. Baker, Esq., for the defendant. And said matter being submitted to the Court without argument, and the Court being fully advised

in the premises, does overrule said exceptions, to which ruling of the Court the defendant through its counsel excepts.

And afterwards, and upon to-wit:—the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

[Title of Cause.]

This matter came on this day regularly to be heard upon the motion of the defendant for a new trial *berein*, J. E. Morrison, Esq., United States Attorney appearing on behalf of the United States and A. C. Baker, Esq., for the defendant. And said matter being submitted to the Court without argument, and the Court being fully advised in the premises does deny said motion.

69 And afterwards, and upon to wit:—the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to wit:—

[Title of Cause.]

Comes now the defendant herein and through its Counsel excepts to the ruling of the Court in overruling its motion for a new trial herein, and gives notice of appeal to the Supreme Court of this Territory from the judgment and from the order overruling the motion for a new trial.

And afterwards, and upon to-wit:—the twenty-eighth day of September, A. D. 1910, the same being one of the regular juridical days of the April 1910 Term of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

[Title of Cause.]

Upon application of counsel for the defendant herein, the defendant is granted a stay of execution in this case for a period of thirty days from September 24, 1910.

Bonds.

Supersedeas bond on appeal. Dated, October 8, 1910, of the defendant, Grant Brothers Construction Company, with the United States Adtelity & Guaranty Company of Baltimore, Md., as surety, in the penal sum of \$94,500.00, conditioned for the prosecution of the appeal herein and the performance of the sentence, judgment and decree of the court if the judgment of the Supreme Court of the Territory of Arizona be against the defendant, and the payment of damages awarded against it upon the appeal.

Endorsed: Approved as to form, Oct. 12, '10. J. E. Morrison, U. S. Attorney for Arizona. Approved and filed, October 12, 1910, Allan B. Jaynes, Clerk.

Bond on Appeal. Dated October 15, 1910, of the defendant Grant Brothers Construction Company with the United States Fidelity & Guaranty Company of Baltimore, Md., as surety, in the penal sum of \$500.00, conditioned for the payment of costs in the Supreme Court of the Territory of Arizona that may be adjudged against the defendant.

Endorsed: Approved and filed October 17, 1910. I hereby fix the probable amount of costs on appeal in this case at \$250.00. Allan B. Jaynes, Clerk.

Bill of Exceptions and Statement of Facts.

[Title of Court and Cause.]

71 Before the Honorable John H. Campbell, Judge of said Court, and a Jury.

On June 2, 1910, the above cause came on for trial in said Court. There were present: the Honorable John H. Campbell, judge of said Court, and a jury, the clerk of said Court and the United States Marshal for the District of Arizona.

The Plaintiff appeared by its attorneys, J. E. Morrison and J. C. Forrest, United States District Attorney and Deputy United States District Attorney, respectively, and the defendant by its attorneys, A. C. Baker and Isidore Dockweiler.

Mr. BAKER: We desire to press the motion to suppress some depositions taken in Mexico by the Government. The motion is on the following grounds:

"Now comes the defendant, by its attorneys, and moves the court to suppress, exclude and strike from the files in the above entitled action the depositions of Alberta Ruiz, Manuel Escobosa, Manuel Tona, Miguel Zazueta and Mateo Ortiz now on file therein, and objects to the reading in evidence of the said depositions, and in support of said motion specifies the following reasons therefor:

1. The commissions to take the depositions of said witnesses
72 were issued without any notice with copy of the interrogatories attached, having been therefore given by the plaintiff to the defendant or its attorneys of record, as required by Section 2507 of the Revised Statutes of Arizona, 1901.

2. Notices with copies of the interrogatories attached, were served upon the attorneys for the defendant on April 22nd, 1910, which said notices purported to notify the defendant that the plaintiff would apply to the clerk of the District Court of the Second Judicial District of the Territory of Arizona for commissions to take the depositions of said witnesses in this action, as appears more fully from the notices, with copy of the interrogatories attached, now on file in this

court in this action, which said notices were the only notices served upon the defendant or its attorneys of record for the issuance of the commissions to take the depositions of said witnesses, and that as appears by the record of this action, at the time of the service of the said notices, with copy of the interrogatories attached, this action was not then pending in the District Court of the Second Judicial District of the Territory of Arizona, but had therefore, by an order for a change of venue of this action entered by the said District Court of the Second Judicial District of the Territory of Arizona, been transferred, and the venue of this action changed to the District

73 Court of the First Judicial District of the Territory of Arizona, and the defendant had, prior to the service of the said notices, and within five days of the entry of said order, given an undertaking to the plaintiff with sureties approved by the Clerk of said court to the effect that it would pay all costs that may be adjudged against it in this action, and had prior to the service of the said notices paid to the clerk of the District Court of the Second Judicial District of the Territory of Arizona all costs for the transcript of the proceedings in this action, and that therefore the said notices are not a notice upon which the commissions could lawfully issue out of the District Court for the First Judicial District of the Territory of Arizona, and that said notices did not authorize and warrant the clerk of the District Court of the First Judicial District of the Territory of Arizona to issue a commission to take said depositions.

3. That the said depositions appear upon their face not to have been properly taken as required by law, nor are the same attested as required by law.

4. That the said depositions were not properly returned into court in accordance with, and as required by Section 2520 of the Revised Statutes of Arizona, 1901."

The motion was argued by counsel.

74 The COURT: I will examine such authorities as both sides may submit, and rule upon this motion later. Now, if these depositions are suppressed, do you desire to go to trial?

Mr. MORRISON: Yes, sir, we have ample evidence.

The COURT: Then you may call a jury Mr. Clerk.

(Whereupon a jury was empanelled and sworn to try said cause.)

The COURT: The plaintiff may read *his* complaint to the jury.

Mr. BAKER: I understand the motion to strike the depositions is denied?

The COURT: No, I have not passed on it yet. I understand that the United States Attorney was ready to proceed with the trial, no matter what the ruling on that might be.

Mr. Morrison then made a statement of the case to the jury.

Mr. BAKER: I suppose this pleading ought to be read to the jury. There is a demurrer here, Your Honor, that I ought not to read to the jury, and it has not been disposed of.

The COURT: I suppose it has been waived, hasn't it?

Mr. BAKER: No, sir.

75 Mr. FORREST: It is too late to submit it now. I requested Judge Baker to argue the demurrer a week or two ago, when he was here.

Mr. BAKER: I don't intend to argue it, and never have.

The COURT: Just read your answer; the demurrer will be regarded as waived.

Mr. BAKER: I except to the ruling.

(The defendant waived its statement to the jury at that time.)

A. E. BURNETT called as a witness on behalf of the plaintiff on direct-examination by Mr. Morrison testified:

My name is A. E. Burnett. On the 29th day of October, last year, I was Immigrant Inspector in the United States Immigration Service, stationed at Naco, Arizona. On that day a party of forty-five or more laborers came across the International line at Naco, Arizona, in a passenger coach. As examining inspector I took this party of laborers to the United States Immigration office before a board of special inquiry.

Q. You say you took them before a board of special inquiry?

Mr. DOCKWEILER: We object to that question as incompetent, irrelevant, immaterial.

The COURT: Objection overruled.

Mr. DOCKWEILER: Exception:

76 Q. Who were the members of that board?

Objected to by the defendant as incompetent, irrelevant, immaterial and no foundation having been laid therefor, and not the best evidence, and it not having been shown that the defendant was present or was represented at that board.

The objection was then argued by counsel, the objection overruled, and the defendant excepted.

A. The Special Board of Inquiry met at Naco on the 29th day of October.

Q. Was any record made of the proceedings of the board at that time?

Objected to by the defendant as incompetent, irrelevant, immaterial, no foundation having been laid therefor, and not the best evidence.

Objection overruled.

A. There was.

I have with me the record of the board, this being a record of the board of special inquiry, held at Naco, Arizona, October 29, 1909, and continued into October 30, 1909. My signature is at the bottom of the last sheet.

Mr. MORRISON: We now offer the record for the purpose of establishing that the persons examined at that time were held to be alien

laborers, and that their status was thereby fixed in such a manner that the record is evidence in this case, tending to establish
77 that fact; I don't say that it is conclusive evidence, but evidence tending to establish the alienage of each of the parties who were examined at that time.

The COURT: Do you expect to show that these are the persons named in the complaint?

Mr. MORRISON: Yes, sir.

Mr. DOCKWEILER: We object to the introduction of the document on the ground that the same is incompetent, irrelevant and immaterial, no foundation laid therefor, and that the document offered is not the best evidence. The document purports to be a copy of some record. It does not purport to be the original record. We object also upon the ground that the same is not certified as required by law.

The witness was then examined as to whether or not the document in his possession was the original, or a copy, and testified:

The testimony was taken down by me, as secretary, personally, in longhand and was transcribed by myself on the typewriter and signed, and this is the only record I have in the office; a copy of it was furnished to the department. When I said in this certificate "I hereby certify that the foregoing is a true copy of the minutes taken by me in this proceeding" I meant that to be the original record transcribed on the typewriter from my longhand notes. By the

word "copy" I meant transcript, and this is the original record.
78 The original notes were taken on sheets of paper in the form of a tablet or tab, and the members of the board or myself did not sign that. I wrote out the minutes in longhand myself and transcribed it in this form, which constitutes the original record in my file. I don't know where the original notes made in longhand are. I am still connected with the Government Service at Naco, Arizona. I cannot tell where the original notes are. I do not know what I did with them, but did not send them to the chief of my department. As I now remember, I made that transcription on the 30th day of October, 1909.

The COURT: Now I think that this record is competent as to the order of the board.

Mr. MORRISON: I do not insist on the testimony going in; just the order and the names of the parties examined.

The COURT: Yes, sir. The names are included in the order.

Mr. BAKER: That record doesn't determine the status of these parties after all. Nothing is said about the status as I understand the record, so the material question is not determined by the record.

The COURT: It recites that they are alien contract laborers. The objection to the admission of the record of the order of the board of special inquiry is overruled.

79 Mr. DOCKWEILER: Exception.

Portion of the record so admitted in evidence marked plaintiff's Exhibit 1, and that portion of the record containing the order read to the jury as follows:

"Board Member JONES: I move that the applicants before the board, namely: Benito Acuna, Jose Acuna, Jose G. Arias, Susano Benitez, Daniel Cabezul, Nicholas Castenada, Martin Coronado, Francisco Corrales, Jesus Cota, Ramon Enriquez, Manuel Escobosa, Simon Espinosa, Teodoro Garcia, Alberto Gomez, Trinidad Gomez, Juan Maria Gonzales, Jesus Guevarra, Nicholas Hernandez, Filipe Jimenez, Eustaquí Leyva, Julien Leyva, Andres Lopez, Ricardo Lopez, Alberto Luna, Francisco Lusania, Mariano Marin, Manuel Mejia, Donicio Nunez, Leocadio Parra, Manuel Peralta, Rumaldo Perez, Gumercindo Portillo, Calixto Ramos, Eduardo L. Rivera. Juan Rodriguez, Alberto Ruiz, Francisco Salazar, Manuel Tona, Abelardo Torres, Manuel Valencia, Agustin Valenzuela, Antonio Vernal, Francisco Vidal, Eulalio Zamora and Pedro Zepeda, be each and all excluded from admission to the United States as alien contract laborers, in accordance with Section 2, of the Act approved February 20, 1907.

Board Member LOCKWOOD: I second the motion.

80 CHAIRMAN: I concur.

Aliens notified of their exclusion and right of appeal, which right, after consultation with the Mexican Consul at Naco, Arizona, they waive.

Case closed 11:15 a. m.

I hereby certify that the foregoing is a true copy of the minutes taken by me at this hearing.

ALFRED E. BURNETT, *Secretary.*"

MR. BAKER: One moment; if the Court please, here is a new question that has arisen on that order, and of course it is a record that we could not see until it was offered here in the court room. Now that record—the order itself determines the question that the parties that they deported were contract laborers. It so decides and finds; as read to the jury. it determines the question that they are contract laborers—the very question involved before this jury. Now we move to strike it away.

The COURT: I- shows that they were excluded on that ground. I don't think for a moment that that proves, or is competent to prove that they were contract laborers, or that they were alien laborers.

MR. BAKER: I understood the Court to rule that it was admissible for the purpose of proving that they were aliens, only, but the order finds that they were contract laborers.

The COURT: Well, all that is in there may not be competent to prove that they were aliens. Let the record show that the Court at -his time offers to limit the purpose for which this is received, if counsel for the defense so desire.

MR. BAKER: Then, may it please the Court, we ask the Court to designate to the jury for what purpose the Court has allowed the record just admitted to go into evidence.

The COURT: Gentlemen of the Jury, this record has been received in evidence for the sole purpose—for the sole reason that, in view of the Court, it tends to prove that the persons named in the

order were aliens, and that they were excluded from the United States—that they were alien laborers.

Mr. DOCKWEILER: Well, now, of course we except to the action of the Court in the premises.

The COURT: I do not understand that counsel objects to the instruction of the Court, just given to the jury, except in so far as it permits the jury to consider this as evidence, tending to prove that the men named in this order were aliens.

Mr. BAKER: Yes, Your Honor, that portion of Your Honor's statement to the jury we object and except to.

The witness then testified further:

Those parties whose names appear in the order of the board
82 came to Naco on the 29th day of October, 1909, on the C. R. Y. & P. Railroad passenger train. A photograph was taken of the parties at Naco, Arizona, on the 30th day of October, 1909. The photograph is in the Immigration Office, which I can get. I know Gustavo S. Randall. I saw him on or about the 29th day of October last year at Naco, Arizona. He seemed to be in charge of this party of laborers.

Q. Now do you know what the business of Gustavo S. Randall was at Naco, on those two days mentioned in the preceding question?

A. I think I do.

Q. Do you know?

Mr. DOCKWEILER: Now he has answered the question by saying "I think I do."

Mr. MORRISON: He thinks he does—that is the only way anybody can testify in answer to such a question—that he thinks in his own mind he does.

The COURT: Oh, he may state what he said and did there.

Mr. DOCKWEILER: Well now what is he going to answer?

Mr. MORRISON: The court says he can state what he said and did there.

Mr. DOCKWEILER: Well now suppose Randall said that I was down there, Your Honor—that is, that he was my agent, or
83 that he was the agent of Mr. Morrison—

Mr. MORRISON: Well, I can't pull all of this case, with twenty-five witnesses here, in at one time or at one moment.

The COURT: I assume that the District Attorney is sufficiently experienced to know that all this will be stricken out unless he connects it up, and I have not called for an avowal for that reason; but if you desire it, I will ask him to do so.

Mr. DOCKWEILER: We ask that he make a statement of what he expects to prove.

The COURT: You may avow, Mr. District Attorney, whether you expect to connect it up with the defendant company.

Mr. MORRISON: I would much rather comply with the gentleman's request. I distinctly avow that I will connect Mr. G. S. Randall with Grant Brothers Construction Company, as being in their employ, through their agents, and as being in charge of this party of

men there for Grant Brothers Construction Company, to deliver them to Grant Brothers Construction Company at Naco.

The COURT: Very well; upon that avowal you may proceed.

Q. Now you saw this Randall there, did you Mr. Burnett?
84 A. It did.

Q. What if any conversation did you have with him there, touching these aliens we have mentioned, and Grant Brothers Construction Company?

Mr. DICKWEILER: Now, we object to the question, as incompetent, irrelevant and immaterial, and as calling for hearsay testimony, no proper foundation having been laid therefor; it not having been shown as yet that Gustavo S. Randall at that time or at any time was the agent of Grant Brothers Construction Company, the defendant in this case, for any purpose whatsoever; and, furthermore, that agency cannot be proved by the declaration of an agent.

Mr. MORRISON: Well, not entirely proved. We will show it by their own officers, before we get through.

The COURT: Upon the avowal of the United States attorney, he may now state it. In the event he doesn't show it, it will be stricken out.

Mr. BAKER: One other objection, may it please the Court; that is, if the parties could here prove an agency, even if they would have sufficient evidence hereafter to show that Mr. Randall was the agent of the defendant in the case, that that would not be sufficient evidence. They must absolutely prove a direct authority on the part of the corporation for the agent to do the act in question, in a

85 suit of this kind. It is a penal statute. Now furthermore, I think, too, Your Honor, that we ought to be allowed to enter our objection, anyhow, to the testimony, even if he has made the avowal. We ought to be allowed to enter our objections to the questions as they arise.

The COURT: There is no disposition on the part of the Court to limit the objections, not only on the part of one counsel, but on the part of two.

Mr. MORRISON: If Your Honor will permit me, I will avow that I will show by this witness that Grant Brothers Construction Company furnished transportation in the republic of Mexico, by means of which these aliens were brought to Naco in the charge of this man Randall.

The COURT: I think that the objection made by counsel should be overruled, upon the District Attorney's avowal, and I do not agree with Judge Baker that if they caused it to be done it is a violation. I imagine a corporation must act through agents, and if he shows this man was the agent of the corporation it would be sufficient in that regard—for the doing of this.

Mr. BAKER: I don't think so, Your Honor.

The COURT: You may proceed.

Mr. BAKER: Exception.

I asked Mr. Randall who was in charge of these men. Mr. Ran-

86 dall replied: "I am in charge. I am instructed to deliver them to Mr. D. R. McDonald, who is to take them to"—in substance—"Grant Brothers Railroad camps." I received a paper from Mr. Randall at that time and this is the paper. I had a conversation with him at that time touching other portion of this paper.

Paper offered in evidence by the plaintiff.

The defendant objected to the introduction of the paper as incompetent, irrelevant, immaterial and no foundation having been laid therefor, and it not having been shown that the paper was issued at the instance or request, direct or indirect, express or implied, of the defendant, or any properly constituted officer, servant, agent or employee of the defendant.

Upon the avowal of the attorney for the plaintiff that the plaintiff will show authority for the issuing of it, and that it goes in subject to it being connected up, the paper was admitted in evidence by the Court and marked "Plaintiff's Exhibit 2" and the defendant excepted to the ruling.

In that conversation Mr. Randall stated that that paper was the return portion of a paper given by Mr. W. W. Carney at Nogales, Sonora, the other portion of which provided for the transportation of himself and a party of laborers from Nogales, Sonora, to Naco; that the conductor took up the other portion of the pass and left

87 him this, which provided for his own transportation back from Naco to Nogales, Sonora. He said Mr. Carney gave him the pass. He told me that he was employed by Grant Brothers or was employed to work for Grant Brothers by W. W. Carney the night before, for the purpose of going in charge of the laborers to be shipped out on the following morning to Naco. He was given the paper on the 29th and took charge of the laborers that were then assembled at Nogales, Sonora, and destined for Grant Brothers. He said that Mr. Carney had told him that there was a party of laborers in a car at Lomas, south of Nogales, Sonora, who were to be picked up by the train from Del Rio, and he was to take charge of that party and deliver them to Mr. McDonald, Grant Brothers' labor agent. Mr. Randall stated to me that Mr. Carney remarked when he handed him this pass that if it didn't provide for a sufficient number, or for as many laborers as would be found in the car at Lomas that he would arrange for the transportation of the balance with the conductor of the train. I know Mr. Carney and received a communication from him a day or two prior to the shipment of laborers, which communication I have here. This is the original telegram received by me. One is a confirmation received by mail. I have seen Mr. Carney write and the signature to this letter is Mr. Carney's signature.

Mr. MORRISON: If Your Honor please, we offer letter dated Nogales, Arizona, October 26, 1909.

88 Mr. DOCKWEILER: We object to the introduction of the letter in question in evidence, upon the ground that the same is incompetent, irrelevant and immaterial, no proper foundation hav-

ing been laid therefor, and it not being shown that the writer thereof was an agent authorized directly or indirectly, expressly or impliedly, to act on behalf of the defendant in this case, at any time, in anything, or in this particular matter.

Mr. BAKER: When did Grant Brothers Construction Company authorize Carney to write this letter?

Mr. MORRISON: He had it under his general authority.

Mr. BAKER: That would not be proof of anything, if the Court please; that would not prove anything against this defendant.

The COURT: Do you claim that he must have been authorized to write the particular letter?

Mr. BAKER: Yes sir.

The COURT: When he was employed to secure alien laborers?

Mr. BAKER: Your Honor, this is an action civil in form only; it is a penal action in substance, and in fact. It is an action civil in form for the purpose of recovering a penalty attached by law as a penalty for the commission of a crime. The act itself is
89 highly penal in its nature. Now it is to be strictly construed by the rules of—by simple construction that statute should be brought within its terms. There must be proof that they are within the terms of a penal statute themselves, before the party is entitled to a penalty. It is true that corporations act only through agents, of course; but the rule to recover penalties in criminal actions against a corporation is entirely different from the rule in purely civil cases for damages by the acts of a corporation.

The COURT: If it be shown that Mr. Carney was authorized by the corporation to procure and send to the defendant corporation alien laborers, wouldn't statements made by him in the course of that employment be competent as against the defendant corporation?

Mr. DICKWEILER: That is correct—the Judge uses the word “alien” laborers.

Mr. BAKER: If he was authorized by Grant Brothers Construction Company to secure aliens in Mexico, or a foreign country, and send them into the United States then they would be guilty and liable in this action.

Mr. MORRISON: Very well—you have confessed your guilt.

Mr. BAKER: Now, if this avowal would go to that extent—not merely that Carney was the agent of the party, but to the
90 extent of avowing that they intend to connect the facts that Grant Brothers authorized him to employ those alien laborers in Mexico—

The COURT: I think upon the avowal of the District attorney that he will show that the writer of this letter was employed to secure alien laborers, that this letter would be competent,—if that be shown; otherwise, it may be stricken out.

Mr. MORRISON: If Your Honor please, I will not go to that extent. I will introduce testimony to prove that he was given general authority to get laborers, and that Grant Brothers Construction Company furnished transportation for alien laborers in the republic of Mexico, and brought them to this country under promises and in-

duancements of wages to be paid them, on their grade that they then were constructing in Arizona. Would it be possible that Grant Brothers Construction Company, or any other corporation or reasonable person, would come here and say that they gave specific authority to an agent to violate the laws of the United States?

The COURT: Well, I mean by that, that you expect to introduce testimony tending to show it. I do not mean to say that you have to show a written contract between Carney and the corporation, but such circumstances as would authorize the court or jury to
91 draw the inference that they permitted or authorized him to send them over. If you are willing to have your avowal go to that extent, the evidence will be admitted; otherwise it will be refused.

Mr. MORRISON: That is the very avowal I meant to make. Your Honor has put it much more gracefully than I could.

The COURT: It may be received.

Letter received in evidence and marked "Plaintiff's Exhibit 3." These two letters bear Mr. Carney's signature.

Letter offered in evidence, but offer withdrawn, as well as letter previously admitted in evidence and marked "Plaintiff's Exhibit 3" all three letters marked for identification.

There was a picture taken of the group of men mentioned in the record of the proceedings of our special board. I recognize this picture as a picture of that group of men. I recognize in the picture of that group of men a number by name and all of them by their faces as the party that was rejected by the board of special inquiry at Naco, Arizona, on October 30, 1909.

Photograph marked for identification "Plaintiff's Exhibit 6."

This picture handed me I recognize as the photograph of a party of laborers excluded at Naco on October 30. I know many
92 of them by name and the physiognomy of all. The two in the center of the group No. "23" and "25" were guards employed by me to guard those aliens pending final disposition of the case.

Photograph marked for identification "Plaintiff's Exhibit 7."

I know W. W. Carney and had a conversation with him touching these alien laborers.

Cross-examination:

There were laborers on that train who were admitted to the United States by me. No certificates of admission were shown me by any of the laborers upon that train: I didn't see any certificate shown to any other officer of the bureau. Seventeen laborers upon that train were admitted by me.

J. R. COLLINS called as a witness for the plaintiff testified:

Direct examination:

My name is J. R. Collins. I am a photographer at Naco, Arizona, and was in that business on the 29th and 30th day of October last year. About that time I made some pictures of a group of men at Naco, Arizona. Plaintiff's Exhibit 6 for identification is a true and correct likeness of the people grouped when I took it. The figures on the picture were not made by me.

93 Picture marked "Plaintiff's Exhibit 6 for Identification" admitted in evidence and marked "Plaintiff's Exhibit 3."

Picture marked "Plaintiff's Exhibit 7 for Identification" was also made by me with the exception of the numbers upon the picture. Picture admitted in evidence marked "Plaintiff's Exhibit 4."

GEORGE HILZINGER called as a witness for the plaintiff testified:

My name is George Hilzinger. I am familiar with the Spanish and English language. I am able to translate the writing on "Plaintiff's Exhibit 2" and it reads:

"Cananea, Yaqui River and Pacific Railroad. Pass G. S. Randall, subject to conditions on back hereof, from Naco to Nogales, account Grant Brothers Con. Co. Not good unless countersigned by J. A. Small. Date, 10-29-09. Void after October 31, 1909. R. H. Ingram, General Manager." On the side: "Countersigned: J. A. Small." On the other side: "Not transferable." The back of the ticket reads as follows: "Obligations of the holder of this pass ticket. This pass ticket is gratuitous, personal and not transferable. It contains no contract of transportation, and therefore title ten, book two of the Commercial Code, and Chapter four, Title thirteen, Book three of the Civil Code, are not applicable thereto. By its mere acceptance and use, the person in whose favor it is issued obligates him-

94 self, first, not to assign or transfer it to a third person, even by gratuitous title; second, to write his signature in ink at the place indicated at the bottom hereof, and to establish his identity thereby or otherwise, to the satisfaction of conductors, when so demanded by them. Third, to make no demand of indemnity or enforce civil liability in case of accident, nor to bring any suit or make any claim whatsoever against the company for injury, damages and losses suffered to his person or property. In case the holder refuses to prove his identity, or any other person than the one in whose favor this is issued uses it, it is the duty of the conductor to take up this document and charge such holder full fare, without prejudice to such civil and criminal actions against such holder as the company may be entitled to bring. The lawful holder hereof is entitled to transport 75 kilograms of baggage free. Signed G. S. Randall, Signature of the party in interest."

Mr. DOCKWEILER: Now, in order to still further preserve our record, we move to strike out the pass just read, and ask the court to instruct the jury to pay no attention to the matter, and to disregard entirely the contents of the pass as read, upon the ground

that the same appears to have been issued to one Randall, named therein, who is not one of the parties described in the complaint in

95 this action, or referred to in the complaint in this action; and upon the further ground that it has not been shown that the man Randall referred to in the pass was an agent or employee or officer of the defendant company; upon the further ground that it has not been shown that any party authorized to bind the defendant Company delivered such document or such pass to Randall.

The COURT: The motion for the present, is denied, with the leave to renew it in the event the District Attorney does not connect it up.

Mr. DOCKWEILER: Exception.

W. W. CARNEY called as witness for the plaintiff testified:

My name is W. W. Carney. I live at Nogales, Arizona, and have lived there a little over five years. My office is in Nogales, Sonora. I am forwarding agent for the S. P. of Mexico. All my business is connected with the railroad company. I had business relations with Grant Brothers Construction Company in looking after the handling of their freight going over the lines, but was not forwarding agent for them during all this time, but have acted in the same capacity for them that I did for the S. P. with reference to freight. All the material of Grant Brothers Construction Company is consigned to the railroad in care of Grant Brothers Construction Company and my duties are practically the same with reference to

96 both companies, but I am not in the employ of Grant Brothers Construction Company, and have not received a monthly salary from them. I have received money from them several times, but was not to my knowledge on their pay roll. I had something to do with the procuring of laborers for Grant Brothers Construction Company. I had a contract under which I operated. It was a verbal contract. Prior to October 28 and 29, 1909, in the last two or three days of August, or the first four or five days of September, 1909, I made the verbal contract concerning the procuring of laborers for them. The contract I made with Mr. Angus Cashion, in which he was to pay me one dollar a head for every man delivered on the works at Courtland, and he was to allow me twenty cents a meal gold, for feeding the men enroute. I suppose the transportation was to be furnished by Grant Brothers. The passes were sent to me from Tucson. I have now a book of blank passes on the railroads of the Southern Pacific in Mexico. The pass, Exhibit No. 2, handed me is in my handwriting. On its face it is charged to Grant Brothers. You have to show somebody to charge it to. I recall the shipment of laborers on the 28th day of October, 1909, of about forty-five or forty-six from Hermosillo. I know nothing about the manner in which their transportation was arranged from Hermosillo to a station called Lomas, just south of Nogales. I know that that car was coming from Lomas. I had a talk about it with C. F.

97 Holler, of C. F. Holler and Company. I know C. J. Rupelius and the firm of C. F. Holler and Company.

Q. State what if any business transaction you ever had

with them, relative—with the firm—relative to the contract which you have stated you had with Grant Brothers Construction Company, concerning the procuring of laborers.

Mr. DOCKWEILER: We object to the question upon the ground that the same is incompetent, irrelevant and im-aterial, and no proper foundation laid therefor, and it not having been shown that he had any authority from Grant Brothers to make any contract with Rupelius, or C. F. Holler and Company, or either, respecting the securement of laborers, alien or otherwise.

The COURT: Is this designed to show the acts of Carney through others?

Mr. MORRISON: Well, yes, his acts through others.

Mr. FORREST: In connection with his contract with Grant Brothers.

Mr. MORRISON: And his relation with Grant Brothers; that he had been with them for years, under salary.

Mr. BAKER: Under the statement of this witness, he simply states a personal contract between him and Grant Brothers; that is
98 this witness had a contract with Grant Brothers, wherein he was to obtain one dollar per head and twenty cents per meal for all men he obtained or delivered, or that were put upon their works. Now that is a purely personal contract between Grant Brothers Construction Company and this witness. This witness could not take a contract of that kind and under it make sub-agents; he could not delegate his power or authority under that contract to any other party, with the assent and knowledge of Grant Brothers Construction Company. That is the legal point we want to make in the objection.

The COURT: Well, I don't see that any such contract as that is a contract for personal services, such as he could not have performed through agents and employees of his own. If that were true, it would be absolutely impossible to enforce this statute—if one may make a contract with another, and then only the last irresponsible person be the one who made the contract for the importation of the aliens.

Mr. BAKER: As I understand the rule, when a contract of that nature is made, constituting agency, that it is a personal contract—one of confidence, or one of reliance upon the skill and ability of the other party that enters into the contract, and that under no circumstances can the other party to the contract employ a sub-agent under his contract, so as to bind the other contracting party.

99 The COURT: I don't think this is a contract that calls for professional skill or personal services, in the sense that counsel urges.

Mr. BAKER: Why, it was made under these circumstances, if Your Honor please: It was made upon the line dividing two countries. To take an alien laborer from a foreign country is an offense against the statute. It is to be presumed that each one of these parties knew the law. Now, the contracting party would be allowed to place confidence and reliance upon the man he had contracted with, not to violate that law, and render him liable to the law in any way, shape or form.

The COURT: Well, I think that is a question for the jury. If this question is designed to show employment and the acts of the employees of this man, you may proceed.

Mr. MORRISON: Well, we will show not exactly employees, Your Honor, in this instance; we will show that he assigned a half interest in this contract. They were to get fifty cents a head; and that under his personal direction they did these things.

The COURT: You may proceed.

Mr. DOCKWILER: Exception.

(The last question was read to the witness.)

A. I had this contract from Grant Brothers, with Mr. Angus Cashion, for one dollar a head and twenty cents a meal and
100 went to Holler and Company, their office being on the American side and I said "If you folks will hustle these laborers I will cut the thing in two with you" and give them fifty cents apiece. I got a dollar a head and would give them fifty cents.

I stated that I would furnish the transportation. The transportation was sent to me from Randolph's office in Tucson. Mr. Randolph sent the transportation at my instance. I did not charge that transportation to my account. The railroad company, knowing that Grant Brothers had this contract, furnished me the transportation—undoubtedly on account of Grant Brothers. All this transportation that I am referring to now is transportation in the United States. The transportation mentioned that I asked for and which came from Mr. Randolph's office was the transportation used in sending the men from Nogales, Arizona, around by Benson, Cochise and around that way to the works. That was all in the Territory. The other transportation, on which this controversy arises, is on the Southern Pacific of Mexico, which is furnished to me by the engineering department, under whom I directly come. I have books of passes in my office. I do not mean to say that the Southern Pacific of Mexico furnishes me transportation to send laborers through

Mexico for Grant Brothers Construction Company. I didn't
101 issue this pass from the United States into the United States or from Mexico into the United States. I issued this pass from a point in Mexico around to another point in Mexico from Nogales, Sonora, to Naco, Sonora, which was as far as my jurisdiction went.

Q. But you did have authority, then, from the Southern Pacific of Mexico, and Grant Brothers, to issue transportation, as you did, in Mexico, and charge it to the account of Grant Brothers?

A. I don't know that I did sir.

Q. Why then did you issue that pass?

A. Well, if you will let me explain—of course I don't want to say anything I ought not to, but I think I can throw enlightenment on it. This particular piece of transportation—we are running a great many laborers from Nogales, Arizona, around to the works up at Courtland, via Benson and Cochise. These men went through the Immigration offices—

Q. Whom do you mean by "we?"

A. By "we" I refer to myself and Holler and Company. We were the parties that issued it——

Q. Don't you also refer to Grant Brothers Construction Company?

A. No, sir; I am not in it. We had run or shipped in the neighborhood of 450 to 500 men. The pass which I have in my hand was given to Mr. Randall and 29 men, from Nogales, Sonora, to Naco, Sonora. Of these 29 men, 28 of them were Mexican laborers.

One of them was a German by the name of Salzman, an
102 engineer who was going over, and he went on this transportation. Of these 28 men, every man of them, to the best of my knowledge and belief, and I believe I am correct, had passed through the immigration offices on the American side at Nogales, Arizona, and if we had been shipping out that way, as we had done before, every one of these men for whom this pass was issued was eligible to go into the United States.

As far as I know the forty-five men in the car at Lomas had never been in Nogales. I sent a telegram to the United States Immigration office at Naco from Nogales, Sonora, on about the 29th of October. This telegram was sent from the Sonora side. I know the telegram was sent from the Sonora side because my office and the telegraph office are adjoining. The telegram handed me is the one I sent. I also sent a confirmation and suppose this is the confirmation.

Telegram offered in evidence by the plaintiff. Objected to by the defendant as incompetent, irrelevant and immaterial and no proper foundation laid therefor, and it not having been shown that the witness Carney was authorized to bind the defendant. Objection overruled and exception by the defendant, and telegram admitted and marked "Plaintiff's Exhibit 5."

103 Letter offered and admitted in evidence.

"Plaintiff's Exhibits 4 and 5 for Identification" bear my signature. The "Plaintiff's Exhibit 3 for Identification" bears my signature.

Papers last described offered in evidence by the plaintiff and objected to by the defendant as incompetent, irrelevant and immaterial, and no proper foundation laid therefor, and it not having been shown that Carney was authorized to bind the defendant, and that the declarations made by him are not binding upon the principal.

Objection overruled by the Court and excepted to by the defendant and letters admitted in evidence marked "Plaintiff's Exhibit- 6, 7 and 8."

I know D. R. McDonald. On the 28th day of October, 1909, he was in the employ of Grant Brothers. He was a kind of roustabout. He did almost anything and everything. So far as I know, if they wanted laborers they would send him out after then and send him to town to buy groceries and everything. My impression is that James A. Cashion was president of Grant Brothers Construction Company. He was either president or vice-president. The envelope

handed me looks like the envelope in which I sent the letter addressed to D. R. McDonald.

Envelope offered in evidence by the plaintiff and marked "Plaintiff's Exhibit 9."

When I said in the letter dated October 28 that I would have a lot of more laborers on Saturday, I couldn't tell exactly
104 where they were coming from, but as things had been running every three or four days there would be a bunch of laborers gathered, and I expected that there would be some more in a few days again. I know Mr. Rupelius went to Hermosillo in the latter part of October on his own personal business; that is on the business of the brokerage firm. It is not a fact that I told him when he was down there to scatter the news; that there was work for Grant Brothers Construction Company on the grade out near Cochise. He was to look over and see what the labor situation was, but I did not use the words to "scatter the news."

Q. Now, Mr. Carney, is it not a fact that at that time, just before Rupelius went to Hermosillo, in the latter part of October, that you had a conversation with him, in which you asked him if he was going in charge of the men around to the grade, from Nogales—another bunch of men that you gathered there in Nogales—and that he replied, "No," that he was going to Hermosillo, and that then it was that you said, "Well, while you are down there, scatter the news that there is work to be had for good wages on Grant Brothers' works in Arizona?"

Mr. DOCKWEILER: We object to that question, on the ground that it is leading and suggestive, and cross-examination of their own witness.

105 The COURT: It is leading, but I think it is thoroughly disclosed, or that there is some testimony tending to show that he was an agent of the defendant for some purpose, anyway, and that it is not improper to ask leading questions.

Mr. DOCKWEILER: We wish to add a further objection,—upon the ground that the same is incompetent, irrelevant, immaterial and calling for hearsay testimony, and it being not shown that the witness here, or Rupelius, or either, had been authorized, directly or indirectly, expressly or impliedly, to bind the defendant corporation.

The COURT: Overruled.

Mr. BAKER: And for the further reason that it is immaterial because if such expression were used, or such occurrence did take place, it would not constitute an offer or promise—to scatter word around; that is not an offer or promise to anybody at all. To merely scatter word around—an offer or promise means something which, if accepted, grows into a legal right. An offer unaccepted is an incomplete contract. The moment it is accepted it becomes a complete contract. Now, to merely scatter word around is not an offer or promise.

The COURT: I should think that would come within the statute.

106 Mr. BAKER: I doubt it very much, your Honor. I do not see that it is such an offer or such a promise as falls within the terms of this statute, and I contend that the offer or promise must be of that nature and character and quality which, if accepted, by the other party, would amount to a legal, binding contract, in a court room.

The COURT: I think that of itself might not be sufficient, but it is something tending to show the general system.

(The last question was read by the Reporter.)

A. No sir, I don't remember of any such conversation.

It was after four o'clock of the afternoon that the laborers arrived that I first learned that a carload of laborers had been shipped from Hermosillo to Lomas. They came on the regular train from Hermosillo, No. 1, on the 28th after four o'clock, as near as I can recollect. At the time this letter was written we were shipping men from Nogales, Arizona, around that way. Every day there were men examined in the Immigration Office. Sometimes fifty or sixty, and we would expect to send those men out the next morning. I said that we were sending seventy-one men from Nogales because at the time this letter was written we had every reason to believe from the men that there would be about that many that day. I often sent tele-

107 grams "Will send thirty men tomorrow" and when tomorrow came we didn't have five. They didn't show up. The telegram says seventy men. The letter says eighty. On the 28th I did not ship men from Nogales, Arizona to Naco, but from Nogales, Sonora. I told the Immigration Officer in this correspondence that I was shipping from Nogales, Arizona, because I get all my mail on the American side. Mail is addressed to me at Nogales, Arizona. That was the reason.

I have received pay from Grant Brothers for about four hundred and fifty men delivered to them under this contract, prior to October 28 at a dollar a head and for meals furnished, which they refunded to me in United States currency. Grant Brothers have paid me for all the men I furnished according to their contract, and the contract was still in force on October 28 and 29 last year. Ninety-five per cent of the laborers furnished prior to October 29 were Mexicans, though we didn't draw the line on anybody—anybody that was able to do a day's work. I did not know that prior to the 28th and 29th day of October, 1909, laborers were gathered together in Hermosillo and brought into Arizona to work for Grant Brothers, and I never authorized or assisted in any shape or form the inducing of Mexicans to come from Sonora into the United States.

108 Q. Mr. Carney, is it, or is it not a fact that it was the general custom of yours that when Mexican laborers would come to your office in Nogales, Sonora, that you would state to them that you could not hire any men, but that if they went across the line that they would probably get work at C. F. Holler and Company's office in Nogales, Arizona?

Mr. DICKWEILER: We object to that, on the ground that the same is incompetent, irrelevant and immaterial, no proper foundation having been laid therefor, and not within the issues of this cause,

and it not having been shown that the witness, Carney, was authorized or empowered, directly or indirectly, expressly or impliedly, to bind the defendant corporation; and, furthermore,—

The COURT: Your objections, Mr. Dockweiler, become confusing. Some of them are evidently not good, but I may overlook some of them that are good, when there are so many of them.

Mr. BAKER: We object further, on the ground that that would not constitute an offer or promise.

The COURT: No, but it may show a system.

Mr. BAKER: But the idea of allowing testimony to prove a system, is to prove the facts constituting the crime or wrong; you cannot prove a bare system. I understand that to mean that you must prove some fact constituting the offense. Now this statement would
109 constitute neither an offer or a promise. It might be an innocent system. It might be a system and not be wrong.

Mr. DOCKWEILER: And there is no charge of conspiracy made in the complaint.

The COURT: No, but there is a charge of encouraging men to come into the United States.

Mr. DOCKWEILER: But we contend, Your Honor, that the prosecution has failed to show that this witness was authorized or empowered by Grant Brothers to bind them in a transaction of this kind. The mere fact that he was employed in American territory to furnish labor at so much per head, does not prove that he is an agent, by any means, or an employee of the corporation. Now I think the evidence has gone sufficiently far to show that the witness here was an independent contractor, responsible to no one but himself, and not able to secure from Grant Brothers, Your Honor, anything more than one dollar, and whatever was actually paid out in connection with meals. Now, it not being shown that the witness was an agent or an employee or an officer of the corporation, it will be necessary to introduce evidence on the other hand to connect up the corporation with his acts. The charges that the corporation here—

The COURT: Do you think that the evidence introduced does not tend to establish that?

110 Mr. DOCKWEILER: Yes, Your Honor, that is our contention.

The COURT: He says he was employed by Grant Brothers Construction Company to secure laborers; he had his office in Mexico; he was to be paid in gold for laborers furnished, and transportation to be furnished—doesn't that establish anything?

Mr. DOCKWEILER: It does not, according to our theory of this case.

The COURT: I was trying to get your theory. It seems to me that there is something there to go to the jury. The jury may give it such weight as they think proper.

Mr. DOCKWEILER: He has not stated, as we contend, the full contract; that is, he has not stated what occurred.

Mr. MORRISON: Well, that cannot be any objection to my question—the statement the gentleman makes now.

The COURT: I am not intimating what it does prove, or that it proves anything; I am only saying that it seems to me a question

for the jury to consider, and it is for them to say what it proves. He may answer the question.

Mr. DOCKWEILER: Exception.

(The last question was read by the Reporter.)

A. It was not the custom, sir.

111 I may have in one or two instances told a Mexican laborer coming to my office in Nogales, Sonora, that I could not hire any men, but that if they went across the line they would probably get work at C. F. Holler and Company's office in Nogales, Arizona. I cannot now recall a single instance, but once in a while an American or Mexican, more American- than Mexicans, would drift into my office and ask for employment. I got Americans that way every day, but the Mexicans did not average one a month. I recall a conversation with Alfred E. Burnett on November 5, 1909. I talked with him several times and made a statement, and I recall the circumstances.

Q. I will ask you if you didn't say to Mr. Burnett, under oath, at that time, the following—I will ask you if this question was not put to you, and did you not answer it this way: "As the agent of the S. P. of Mexico either upon his own responsibility or at your suggestion or request, furnished transportation for Mexican laborers from Hermosillo to Nogales, Sonora?" Answer: "Not that I know of. I have never authorized him to issue transportation to anybody." Question: "Have you ever asked him, the agent at Hermosillo, to send up any available laborers that might be out of employment at Hermosillo?" "No. My recollection at this time would be no. I

112 have asked him several times over the wire what the labor situation was there, but I don't recollect at this time of ever asking him to send laborers. The inference that he would probably draw from my inquiries was that we were in need of laborers, and that should any come up from there and apply to us, we would give them work, but of course these laborers are expected to apply on the American side, as we would not employ them on the Mexican side. My office being on the Mexican side, and having been located there so long for the railroad company, a great many people apply to me for all kinds of information. A great many of these people so applying are laborers, looking for work. If they are Mexicans, and a great many of them are, I send them to Holler's office, on the American side, telling them that he is the agent who does the employing of all laborers, and the men leave my office and I suppose apply to him?"

Mr. DOCKWEILER: We object to the question upon the ground that the same is incompetent, irrelevant and immaterial, and upon the further ground that it is an attempt by the plaintiff to impeach its own witness, and to contradict its own witness.

The COURT: Now I want to know the purpose of this. Is this to refresh his recollection?

Mr. MORRISON: Yes, sir, to test his recollection.

113 The COURT: This is only for the purpose of refreshing his recollection?

Mr. MORRISON: Yes, that is all, Your Honor.

The COURT: Very well, if it is not for impeachment, but to refresh his recollection, he may answer.

Mr. DICKWEILER: And then, Your Honor, we add the further objection that this witness's memory cannot be refreshed by and in the manner proposed by counsel for the government.

The COURT: I think it may—where he made a statement at an earlier time and when his recollection was fresh.

Mr. DICKWEILER: Exception.

A. Why, yes, of course I made it.

I never knew anything about the car containing these forty-five aliens coming up from Hermosillo to Lomas. The dispatcher's office and my office adjoin and he told me late in the afternoon that there was a car of laborers coming up from Hermosillo. I told him to set that car out at Lomas, a little station four or five kilometers south of Nogales, knowing that if the laborers got into Nogales they would scatter. That is all I had to do with that car. The laborers were for

Grant Brothers, because theirs was the only place where any laborers were going to that I had anything to do with. I knew they
114 were coming up because I got word about four o'clock. I state positively that I did not arrange the transportation between Hermosillo and Lomas. If the records of the Southern Pacific Company show otherwise their records are positively mistaken. I caused the car to remain at Lomas that night and told Mr. Holler that the car of laborers was there and that we should send them something to eat, and we sent them in the neighborhood of eight or ten dollars' worth of provisions. I and Holler paid for those provisions because the car of laborers was standing out there on the desert with nothing to eat. It was merely a good Samaritan proposition. We have never been reimbursed and did not expect to charge that to Grant Brothers Construction Company. If the men had gotten into the United States and been accepted by Grant Brothers I would not have charged that to Grant Brothers because I had no contract to handle any men in Mexico, in Sonora. I issued this transportation for the 29 men from Nogales, Sonora, to Naco, Sonora, because it was the only shipment we ever shipped through Sonora. All other shipments had been going around through the States. For that I had blank passes from Colonel Randolph's office. This transportation that I sent these men on was the first shipment we had made there, and I simply used a Southern Pacific of Mexico pass to send these men over. There was written on the pass "Account Grant

Brothers." Grant Brothers made no claim against me for
115 that transportation. I don't think they ever got those men that went on that pass. They got seventeen out of that bunch, but they did not go on that pass. On that pass twenty-eight other men and one American or German went. I mean to say that on that trip on that pass of the stub, which the Government has, more than seventeen men went. I know Gustavo S. Randall and met him that night. The night before we shipped these men on my way home I went by Holler's office and I stopped there, and they told me they had a bunch of men to go. Mr. Rupelius, who was going

with them, could not go. I won't say that Mr. Rupelius was in Nogales on October 28 or 29. Holler and Company at their offices that evening introduced Mr. Randall to me as a brother of the cashier in the Sonora Bank. I did not know him, but as I was well acquainted with the cashier in the Sonora Bank, Mr. Randall was satisfactory to me. They told me they had a bunch of laborers—I don't remember how many, and I told Mr. Randall I would meet him at the train in the morning and furnish the transportation. I came to the train, which leaves Nogales, Sonora at 7:30. Mr. Randall was there and a bunch of laborers. Mr. Randall called a roll of these men and wrote their names on a slip of paper which he gave to me. I counted the number of men on the slip and went to my office on the second floor of the depot and wrote the transportation, as I now

recall for Randall and twenty-nine men. One of the men
116 was a German not figured in with the laborers. My conversation with Mr. Randall in the morning and evening was not as long as I have been telling it here. I don't remember that I told Randall, when I met him in the evening, that there was a car of men at Lomas. I knew that this car was set out at Lomas to go over to Naco, but didn't know how many men there were. The dispatcher instructed the conductor of the train to take this car up at Nogales and to take it over to Naco. The dispatcher did that because I told him. The next morning on orders of the train dispatcher it was picked up, put on a regular train and taken over there. I told Mr. Lindsay and he issued the orders on my instruction. At that time I didn't know how many men there were in that car at Lomas, but the conductor on his return trip was to come to my office and get the transportation for the number of men in that car from Lomas to Naco, which he did. I suppose that pass was written like the others "Account Grant Bros. Con. Co." I do not know the agent at Hermosillo and he did not wire me about noon on the 28th that this car was coming up, and I am positive that I didn't issue any transportation for the car or for the people in the car from Hermosillo to Lomas, and do not know how that car came up from Hermosillo to Lomas. When the conductor, Mr. Fontis, came back the next morning I then first learned the number of men in the car and

I gave him the transportation for the number he said was in
117 the car. At the time I had the conversation with Gustavo S.

Randall that I testified to, I gave him five dollars to defray expenses of the route from Nogales to Naco. Holler and Company employed him, I did not. The money was for a little food or any contingent expenses necessary for the men that he took out to Naco. I never made any charge of the five dollars. It was a voluntary contribution. Those were natural expenses in getting the men. It cost us sometimes several dollars to make the trip. I agreed to pay Randall but he never came back and did not get his money. Holler and I worked together. Randall was employed to take charge of these men, and take the receipt of Grant Brothers for the men that had passed through the Immigration Office, only for those I got paid. If the men had passed through the Immigration Office the men could have been delivered to Grant Brothers at Naco,

and Grant Brothers would give a receipt for them. Grant Brothers had an agent or representative there, D. R. McDonald: I expected him to be there. I addressed a letter to him there. I gave the letter to a Mr. Salzman. I don't speak Spanish and as Mr. Randall doesn't speak English well I talked to Salzman and gave the letter to him. Salzman worked in our engineering department and was free to cross the line. Probably Randall got held of the letter. If the men had passed the Immigration Office I would not have made a charge of the

five dollars against Grant Brothers, because my contract with
 118 Grant Brothers said that they would pay the expenses in Arizona; they had nothing to do with Mexico. When I said in my testimony that I was not on their pay roll I understood it to be as labor agent, or something of that kind. Practically ever since Grant Brothers have been down there I have performed a great deal of labor for them. I handle their telegrams, advance money on their telegrams and each month I make out my bill and I get a check from them from the front.

Cross-examination:

The arrangement with Mr. Angus Cashion in reference to obtaining laborers was in the last two or three days in August, or the first three or four days in September, 1909. We were at the time at the Moctezuma Hotel in Nogales, Arizona. I don't know whether or not anyone else was present. Mr. Pearce was about the hotel. Mr. Angus Cashion, as far as I know, is general foreman of Grant Brothers. He was at the front there all the time and was head foreman there. There had been some laborers shipped out that day and I said to Mr. Cashion "Mr. Cashion give me a chance to make a dollar on shipping some of these laborers." We talked quite a bit and he agreed to give a dollar a head for every man I delivered to the works in Arizona, and the actual cost of food for the men not to exceed twenty cents a meal. I was to be at all expense of

119 seeing that these men were delivered there. I was to get these men at Nogales, Arizona. We also talked to see whether I could get some in Douglas, Arizona, and Naco, Arizona. Mr. Cashion gave me instruction as to where I was limited in getting those men. He said "You know the Immigration laws. You know all these things and whatever you do you must get men on the American side and not go into Mexico for men, nor do anything in any way that would complicate us in this matter—most positively." I understood those instructions. At that time I was and had been for five years general forwarding agent for the Southern Pacific Railroad Company of Mexico. In that capacity the company had furnished me with a book of passes and this pass that was introduced in evidence here came to me from the Southern Pacific Railroad Company of Mexico under my arrangement with them. It did not at all come from Grant Brothers Construction Company. I know Mr. James Cashion. He is general head man of Grant Brothers Construction Company and also know Mr. Burton. I remember seeing them in Nogales, Arizona, about October 25, 26 or 27, 1909, some days prior to the shipment of these men to Naco. I received

instructions from Mr. James Cashion upon that occasion. He had been East and I told him I was getting laborers. He said "Where are you getting them from?" I said "I am getting them from

120 Arizona," and he talks pretty rough sometimes, and he went after me, and says: "Now don't you do anything, by God, Carney, that you ought not to do; don't you go into Mexico for a single man." He told me I must not go out of Arizona for anybody and emphasized it very strongly indeed. I think Mr. J. E. McLean and Mr. Burton were present. The book of passes from which I took this pass in this case was one of the general Southern Pacific passes, sent me for the furthering of the Southern Pacific Railroad Company's work in Mexico. The twenty-nine men on this pass, to the best of my knowledge and belief, had all passed through the American Immigration Office and were entitled to go north, but we shipped them out of Sonora. This was the only shipment made to Naco. The other shipments referred to in my testimony were made out of Nogales, Arizona, to Cochise and Pearce. I gave this pass to Mr. Randall with that body of twenty-nine men. The other pass for the forty-five men in the car I gave the next morning out of the same book, belonging to the Southern Pacific Railroad of Mexico.

Q. Now I want you to tell this jury if you had any authority at all from Grant Brothers Construction Company to use that pass book in that behalf at all, in any way, shape or form.

Mr. MORRISON: We object to that, as calling for a conclusion on the part of this witness. It is a question for this jury to say, from the facts, and for the Court to draw the law from the facts, as
121 to whether he had authority or not. It is not for this witness to say whether he had authority or not.

The COURT: I think it calls for a conclusion.

Mr. BAKER: Oh, no sir—no sir, it is not a conclusion. I can absolutely state, under an agreement or arrangement, when these gentlemen told me to go and do a certain thing, and I have gone and done a certain thing, I can state as a matter of fact that I had authority to do that thing.

The COURT: You may ask him whether anybody told him he might use it, or anything of that sort. I think it calls for a conclusion. He may regard the authority as something different from what the court and jury would.

Q. Was the act—your act in giving those passes for those men—either the twenty-nine or forty-five men—upon that occasion, your individual, personal act, or were you acting for Grant Brothers Construction Company.

Mr. MORRISON: Wait a moment: we object to that, if Your Honor please, on the same ground. It is a question to be drawn by this jury from these facts, whether that was his separate, individual act, or whether it was the act of Grant Brothers, and authorized by them. Let him state the circumstances. It is for the
122 jury and for Your Honor to draw—I don't know which way, but let it be either one or the other.

The COURT: I think it calls for a conclusion.

Mr. BAKER: Note an exception.

No members of Grant Brothers Company ever told me to use those passes for those twenty-nine or forty-five men that went around to Naco, and I did not inform any member of that firm at all that I was going to use those passes for that purpose and no member of Grant Brothers Construction Company knew that I was going to so use them.

Redirect examination:

I never used a pass in Mexico for bringing men up to the border, but I have used passes a good many times in shipping men from Nogales, Sonora, down into the interior. Grant Brothers knew nothing about the transaction. They had no means of knowing. When I said that they had no means of knowing, I referred to Grant Brothers Construction Company as a whole, and not to their camp located in the Sulphur Springs Valley. I had instructions to ship the men that way. I had no instructions to ship them from Hermosillo to Lomas and from Lomas into Naco. The instructions I had was to ship men for the work in Courtland, via

123 Naco, and not around by Cochise and Pearce. I most positively say that I had never before the 28th or 29th of October assisted, issued or arranged for transportation, or caused to be arranged for Mexican laborers from Hermosillo up to Naco—Nogales, Sonora. I do not recall that in the latter part of September, C. J. Rupelius brought a hundred men from Hermosillo and that I arranged the transportation for them to Nogales, Sonora.

Recross-examination:

The reason for the instruction to ship from Nogales, Arizona, to Naco was because the work had gotten within seven miles of Naco, and to ship the men from Nogales, Arizona, around to Naco for the simple reason that the men could leave Nogales, Arizona, in the morning and could be in the camp that night.

Further direct examination:

I don't think that anything was said where I was to ship the men from. I was to ship them via Naco. I had plenty of transportation in the United States to ship from Nogales, Arizona. The transportation is a laborers' ticket. It is not a pass, but I did not use that American laborers' ticket. I used Mexican transportation. I followed instructions in shipping them that way. At this time Grant Brothers Construction Company were constructing a railroad in Cochise County, throwing up embankments and making

124 railroad cuts getting the road bed ready for the rails. I think they started at Pearce. The objective point or terminus was Naco, Arizona. This was between Bisbee and Douglas headed for Naco, Arizona. In the instructions I received from Jim, or Angus Cashion, or from Grant Brothers Construction Company, I was not directed to use this Mexican transportation in

sending men through Mexico from Nogales, Sonora. Prior to these dates I had shipped men from Nogales, Arizona, to Benson on the Southern Pacific Railroad Company, from Benson transferring them on to the regular main line of the Southern Pacific to Cochise and then down on the little road from Cochise to Pearce and to the grade, all in Arizona. The instructions I speak of was to the effect that I was to discontinue sending men over that route in Arizona, and to send them through Mexico from Nogales, Arizona, or Nogales, Sonora, to Del Rio, a junction station on the new road in Mexico on the old Rio Cananea Yaki River and Sonora Line and from there on the old line to Naco. From the time they left Nogales, Arizona, until they arrived in Naco, Arizona, they were all the time in Mexico. Grant Brothers did not furnish me the transportation and no instruction was given me as to what transportation I was to use in sending them through Mexico. Nothing was said about transportation. Under the contract I had
125 with Grant Brothers they were to furnish the transportation from Nogales, Arizona, to the work.

Further cross-examination:

The instructions I refer to I received in a letter from a man signed Pearce.

Further direct examination:

The seventeen men that had passed the Immigration Office at Naco were received by Grant Brothers and they paid me a dollar a head for them. I think the seventeen men went around that way through Mexico.

A. E. BURNETT recalled as a witness for the plaintiff testified:

I received "Plaintiff's Exhibit 5, 7 and 6," as inspector in charge of the Immigration service at Naco,—the telegram marked "Exhibit 5" on October 29. Exhibit "6" on October 27. Exhibit "7" on the 28th or 29th of October. I saw Plaintiff's Exhibits "8" and "9" in the Immigration Office at Naco on the 29th and 30th of October, 1909. They came into my possession as such inspector and were presented to the board of special inquiry by a witness named Gustavo S. Randall. I saw D. R. McDonald on the 28th, 29th or 30th days of October last year.

Q. State what if anything he did with reference to the
126 party of alien laborers whom the board was then examining as to their right to be in this country, and before the board reached a determination in the matter.

Mr. DICKWEILER: We object to the question upon the ground that the same is incompetent, irrelevant and immaterial, and assuming a fact not in evidence, to-wit: that the parties were alien laborers; and, furthermore, that no statement by McDonald could in any way bind the defendant corporation, unless it were first shown that McDonald was such an agent or employee of the corporation

as had the power, either expressly or impliedly, to bind the defendant corporation.

The COURT: Read the question.

(The Reporter read the last question.)

The COURT: The question may be answered.

Mr. DOCKWEILER: Exception.

A. D. R. McDonald appealed to me a number of times—at least twice—while the board was deliberating on the case, urging a speedy determination in order that he might, as he said, get the men off on the east-bound E. P. & S. W. train, to Grant Brothers' camp, that afternoon. The train had gone east on the E. P. & S. W. and the hearing had extended into the evening. He came and asked permission to take the men, then before the board, to a restaurant, to feed them.

127 We granted the permission to feed the men shown in the photographs and accompanied him to the restaurant. I asked him who was to pay for it and he said Grant Brothers Construction Company when he should present his bill.

Cross-examination:

Neither myself nor any of the Immigration officers required Mr. McDonald to provide the food for those men. I have no recollection of having suggested it to him. All of these men did not make application for admission into the United States. Exhibit "1" contains the statement "All of the above named aliens arrived in special car on C. R. Y. train No. 21; D. W. Bunch, conductor; applied for admission; were duly sworn and testified as follows respectively." Whether the men came or were brought into the United States it is my duty to see that they don't gain unlawful entrance until they have been examined with respect to their right to enter. I found them on the train. Nobody made application for the admission in that sense. I found them on the train, and took them off. They had not applied in the sense of asking to enter further than their acts in coming across the International line. I took them off the train to the office to determine their admission and then the special board had the hearing that I testified to. Seventeen of the aliens passed. I do not know what became of them, but D.

128 R. McDonald took them in charge and departed with them down the street. These seventeen came on the same railroad train with the forty-five others.

C. F. HOLLER called as a witness by the plaintiff testified:

Direct examination:

My name is C. F. Holler. Myself and C. J. Rupelius were partners under the firm name of C. F. Holler and Company on October 28th, 29th and 30th of last year. Our office was in Nogales, Arizona, where we had been in business about nine or ten months. I have known W. W. Carney for about five years. His office is in Nogales, Sonora, about two hundred yards from our office in Ari-

zona. In the latter part of August, or the early part of September our firm had an arrangement with Mr. Carney relative to securing laborers for him.

Q. Go ahead and state what that was.

Mr. BAKER: We want to enter an objection to this, specifically, may it please the Court, for the reason that Mr. Carney had no authority and could not delegate his authority, if any had ever been granted to him by Grant Brothers, to Holler and Company. In other words, that W. W. Carney could not employ a sub-agent whose actions would be binding upon Grant Brothers Construction Company, under the contract that they had made with W. W. Carney.

129 Mr. MORRISON: I think Your Honor has already ruled on the point, this morning.

The COURT: I think the question may be answered.

Mr. BAKER: Except.

A. Yes, Mr. Carney made an arrangement with Rupelius, my partner to employ men to send to work for Grant Brothers Construction Company on the new railroad that was being built near Courtland. We were to receive fifty cents, gold, for each man sent.

Mr. Carney was to pay the expenses for feeding twenty cents per head and transportation to the place. The payments to us were made by Mr. Carney's check. I believe the checks were signed by Mr. Carney, but I am not positive.

Q. Did you proceed. Mr. Holler, under the arrangement that your firm then entered into with Mr. Carney, to secure laborers for Grant Brothers Construction Company?

Mr. BAKER: We object to it, on the ground I have already urged, that Carney could not bind Grant Brothers Construction Company by an arrangement he might have made with Holler and Company.

The COURT: Overruled.

Mr. BAKER: Exception.

130 A. Yes, I believe we started in the same day we made the arrangement.

It was in the former part of October or the latter part of September. I don't remember positively when the contract was made with Mr. Carney, but it was about this time. About that time C. J. Rupelius made a trip to Hermosillo, Mexico, on business for our firm. That was the only business he went down for. He was in Hermosillo for a few days on that trip and returned to Nogales. No one came back with him as far as Nogales, Sonora, that I know of.

Toward the middle of October he made another trip down there. He made two trips altogether as far as I know. I don't know that on one of the trips he came back with a hundred laborers as far as Nogales, Sonora, and do not know that Mr. Rupelius gathered laborers at Hermosillo and brought them up there and told them to go across the line two or three at a time and apply to C. J. Holler and Company in Nogales, Arizona, when they would be forwarded to Grant Brothers Construction Company. C. J. Holler and Com-

pany in Nogales, Arizona, employed laborers and forwarded a great many to Grant Brothers and received pay for it under this contract. Between six and seven o'clock on the evening of the 28th of October I drove from Nogales in company with Gustavo S. Randall to Lomas Junction. We arrived there in about twenty minutes. We went

131 to take some lunch to laborers down in Lomas, Mexico, in the car. I did not know in a way that Mr. Rupelius had sent the laborers up there. Lomas is a station and a junction point on the Sonora railroad between Nogales and Hermosillo. I took some provisions with me and turned them over to the men for distribution to feed them. Mr. Carney told me that a car of laborers from Hermosillo was to be set out at Lomas and mentioned that he had better arrange for food for them.

Q. Now at that time was there not a conversation between you and Mr. Carney and Mr. Randall, concerning the labor matters, in which Mr. Randall was to take charge of them, or something to that effect?

Mr. DICKWEILER: Well, of course it is not contended that any officer of the defendant corporation was present at the time of this alleged conversation, is it, Mr. Morrison?

Mr. MORRISON: I am asking the witness; I am not contending anything at all. I am not testifying.

Mr. DICKWEILER: Well, we object to the question upon the ground that it is incompetent, irrelevant and immaterial, unless it be shown that an officer of the corporation was present at the time of the conversation sought to be produced took place, or some one who was authorized either expressly or impliedly to bind the corporation.

132 The COURT: The objection is overruled.

Mr. DICKWEILER: Exception.

A. Yes, there was.

I introduced Randall to Mr. Carney and Mr. Carney arranged for Randall to go with the laborers that were to be delivered to Grant Brothers in Naco. There were two groups, one group from Nogales of about thirty. I don't know how many of that group were shipped from Nogales, Arizona, but I suppose thirty, and all of them had passed through the Immigration Office at Nogales, Arizona. They were not shipped from Nogales, Arizona, but from Nogales, Sonora. I don't know the actual number of them that left that morning. At the time Carney had this conversation with Randall he informed me about the car at Lomas and Randall's employment was to take them all. I do not know how the transportation was arranged from Hermosillo to Nogales. It was never paid by our firm or charged to it, and it had nothing to do with the transportation. The money for the provisions I paid myself. I was never reimbursed for it.

Cross-examination:

At the time this arrangement was made Mr. Carney stated nothing to me, because the arrangement was made with Mr. Rupelius,

my partner. Mr. Rupelius told me about it and I accepted.
 133 I afterwards spoke to Carney about it. As I remember, Carney did not say to me that his instructions from Grant Brothers were not to have anything to do with men in Mexico.

Mr. Carney did not tell me that as I remember. The thirty-one men that I mentioned were obtained at my office in Nogales, Arizona. All the men that I sent to the camp of Grant Brothers under this arrangement with Carney had applied in my office at Nogales, Arizona, and arrangement had been made with them on this side of the line after they had gone through the Immigration Office. Every one of them went through the Immigration Office.

Redirect examination:

The men formerly employed by Grant Brothers Construction Company were mostly Mexicans, about eighty-five or ninety per cent. I do not know where they came from before applying at my office, but the first ones came by themselves. On account of it being a small town I expect they spread the word that they could get employment at my office if they would come across the line. I mean that between themselves, though not knowing anything about Holler and Company's business, they had spread the word to come over and that I would employ them.

C. J. RUPELIUS, called as a witness by the plaintiff, testified:

134 My name is C. J. Rupelius. In the months of September and October I lived at Nogales, Arizona, and was engaged in the brokerage and general commission business as a member of the firm of C. F. Holler and Company, under which name the partnership was known. In the latter part of August or in September I had business dealings with W. W. Carney concerning the procuring of laborers for Grant Brothers Construction Company. I had known Mr. Carney quite a while. His office was at that time at Nogales, Sonora, Mexico. The office of C. F. Holler and Company was at Nogales, Arizona, about two to four hundred yards distant. One in Arizona and the other in Sonora. Mr. Carney however lives in Nogales, Arizona, but did not have an office on this side that I know of.

Q. You may state to the jury what your business arrangement with Mr. Carney was, at the time you say you had it, respecting the procuring of laborers for Grant Brothers.

Mr. DOCKWEILER: We object to the question, as incompetent, irrelevant and immaterial and no proper foundation laid thereof, and upon the further ground that no statement made by either Carney or by this witness, in the absence of an officer of the Grant Brothers Construction Company, can possibly bind the defendant; and on the further ground that it has not been shown that either Carney or the witness was authorized or empowered, directly or indirectly,

135 expressly or impliedly, to bind the defendant corporation in any way in regard to the transaction he is about to testify to. And I suppose it is stipulated, Your Honor, without repeating that objection, that the same objection will stand as being made to

all questions put by the District Attorney to the witness, in connection with his testimony?

The COURT: I shall overrule the objection——

Mr. MORRISON: All questions? What his name is, for instance?

Mr. DOCKWEILER: No, not that.

Mr. MORRISON: Well, we object to any such stipulation.

Mr. DOCKWEILER: All questions relative to this matter of furnishing laborers. Now I have not made a single objection, so far, to the testimony of the witness, because he has not testified to anything affecting this case. He has given his name and where he resides, and so forth.

The COURT: You may, if you desire, have the record show that you object to this line of testimony.

Mr. MORRISON: I would like to have him be a little more specific, if Your Honor please. What does he mean by "This line?"

The COURT: Of course there may be some matters here that are subject to objections.

136 Mr. DOCKWEILER: Well, of course if the examination goes outside of the line that we all understand, I will make a specific objection, or Judge Baker will do so.

The COURT: Your objections are so broad and so comprehensive that it might be good as to some particular question, as to the form, or something of that sort.

Mr. DOCKWEILER: Well, I have not included "leading" or "suggestive" in my objection—my general objection—at all.

Mr. BAKER: There is one more specific objection I want in the record, and that is this: That Carney had no power to delegate his authority to any one else, who might proceed under this arrangement with Grant Brothers Construction Company.

The COURT: Now there is something tending to show here that Grant Brothers accepted and confirmed the acts of these men, and it is upon that theory that I am allowing this to go to the jury.

Mr. DOCKWEILER: Now the Court overrules this objection, and as to all other objections deemed to be made to questions on this line, and the defendant excepts at each ruling.

The COURT: Very well.

Mr. MORRISON: Your Honor, I hesitate to proceed under any such statement. The gentleman has stated an objection here that
137 Your Honor says is wide and broad, and comprehensive, and includes everything from "no foundation laid" to, I don't know what, and on the record in the Supreme Court, the judge writing the opinion would look at it and say, "Here is a stipulation, and here is a question that is open to objection."

The COURT: Well, if counsel objects to that arrangement, of course counsel for the defendant will have to make objections. You may proceed.

(The question was read by the Reporter.)

The COURT: I will sustain this objection, because it calls for the conclusion of the witness. You may ask for the conversation, if you desire.

Mr. MORRISON: We withdraw the question.

Q. State what if any conversation occurred between you and Mr. Carney, on the occasion to which you have just referred, touching the labor contract.

Mr. DOCKWEILER: We make the same objection just made to the last question.

The COURT: Overruled.

A. Well, he came around one morning and he told me, he says "I have got a little transaction to talk to you boys." I was there by myself, and Mr. Carney came into the office. He says, "I have got a commission, a little business from Grant Brothers to obtain 138 laborers for the construction of the Arizona and Colorado railroad." I says: "Yes, what about it?" He said "Well I can't do it on the Mexican side, and I would like to have you boys that have your office on the American side to engaged these men for this work." He then said that he was to get a dollar for each man, which he would divide with C. F. Holler and Company, to which I agreed. The same day we started and put out a notice in front of the door.

There was nothing said at that time about the transportation and feeding of them. During the fall I made three or four trips—three I think—to Hermosillo, Mexico. The first time I went I saw several Chinaman merchants and while there I was asked to scatter the word that there was work in Nogales for laborers.

Q. Well, what if anything did you do down there with reference to laborers at all?

Mr. DOCKWEILER: We urge the same objection.

The COURT: The same ruling. Answer the question.

Mr. DOCKWEILER: Exception.

A. I don't remember exactly what I did, but I spoke to Ramon Felix and told him. He went among the Mexicans to gather up some and got a bunch of them together and came to Nogales. 139 I came on the same train that they did. I don't know who furnished the transportation. I did not pay it, in a way I arranged for it. I went to the agent, Monteverle, and told him that there was a bunch of Mexicans in the car ready to go to Nogales for the purpose of asking for work at Nogales, Arizona, from C. F. Holler and Company. They were employed by Grant Brothers Construction Company at Cochise.

If telling the agent that there was a bunch of men there to go to Nogales was the making of an arrangement for transportation, I did. I knew the agent well. There was nothing in my conversation with him to indicate that I had any authority to direct him to put a car in the train and have it carried to Nogales. The car went on that kind of an arrangement. That was the way it happened. Most all of the men were Mexicans.

Q. After you got to Nogales, Sonora, or en route, on the road from Hermosillo to Nogales, Sonora, what if anything did you say to them, with reference to the manner in which they should enter the United States?

Mr. DOCKWEILER: The same objection.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

A. I don't exactly recollect what I said.

But I remember I told one or two of them that if they
140 were going to Nogales to apply for a job with C. F. Holler and Company, and if there was a big crowd not to go all together in a bunch to the office for they had to pass or go through the immigration inspectors, something like that. After they got to Nogales, and applied for a job, they were to get transportation from Nogales to the end of the track from Grant Brothers or from W. W. Carney. I am sure about that. I think I told them that they would be sent by C. F. Holler and Company to work for Grant Brothers on the grade. I don't remember having told them anything about furnishing transportation from Hermosillo to Nogales. I don't know what became of the ninety men. They might have applied to C. F. Holler and Company and sent to Grant Brothers Construction Company. I think some of them applied, but I am not sure. We did not keep our eyes on them. We did not care about the fifty cents, but took no precautions whatever to see that none of the men got away after they got as far as Nogales, Sonora. Before going down on this trip, I think in the afternoon, Mr. Carney came in and he asked me how many men we had together. We had thirty or forty men ready to go. He said: "Who is going? Are you going to take them down?" I said: "No, because I think I am going to Hermosillo tonight" and then arrangements were made for another man to take those men from Nogales, Arizona, to the end of the track. This was

when we were sending them around by Benson. Mr. Carney
141 said it would be a good idea to scatter the word in some way or another around Hermosillo that there was work in Nogales; that C. F. Holler and Company were hiring men for this construction company for the construction of the roads. My expenses for going to Hermosillo on those trips was paid by C. F. Holler and Company. Our firm got no money from Grant Brothers after we brought those ninety men up. Mr. Carney settled with us after that. He settled with us for the laborers brought up there and brought up from Mexico. I was in Hermosillo about the 26th or 27th of October. I know Mateo Ortiz, Luis Sanchez, Ramon Felix and Barney Cohen of the Cohen Hotel. On that trip I was, in Hermosillo trying to buy wheat and corn, and looking after commissions, nothing else. While there, I scattered the word; the same as I did the first trip.

Q. Well, what else did you say?

Mr. DOCKWEILER: The same objection.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

I said to several people that C. F. Holler and Company were hiring laborers for the construction of a road between Cochise and Naco. I said this to several people when they asked me. I did not say to Mateo, Ortiz, about the 25th, 26th or 27th of October, in Hermo-

142 sillo, Mexico, that my business there at that time was to get laborers to work for Grant Brothers Construction Company on their railroad grade in Arizona.

I did say, that we had a contract with Mr. Carney, and that we were to gather up some men, and that if any wanted to go there and apply for work that they could get it in Nogales.

Q. What if any conversation did you ever have with him (Luis Sanchez) in Hermosillo, touching the employment of laborers about the 25th, 26th or 27th of October last year?

Mr. DOCKWEILER: The same objection.

The COURT: Overruled.

Mr. DOCKWEILER: Objection.

I told Luis Sanchez at the time that if he knew any laborers, willing to go to Nogales, who would ask for work at C. F. Holler and Company, I would pay him. I don't know whether I was to give him a dollar and a half or two dollars—something like that—which he did.

I don't think I gave Luis Sanchez a list of the wages which Grant Brothers would pay. I might have done it. He asked me "What is the wages that they are paying for the work?" I think that is what he said. I told him a dollar and a half up to two dollars, gold. He asked me to write it down on a sheet of paper and it was put down.

I have known Ramon Felix probably a year. He lies
143 in Hermosillo. He helped me to get up the party of ninety.

Q. What if any transaction or conversation did you have with him, with reference to gathering this party of laborers of which you have just testified, the last party?

Mr. DOCKWEILER: The same objection.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

A. I asked him if there was any labor there. He says, "There is lots of them, and they want to go to Nogales and apply for a job at Nogales, Arizona."

I knew there wasn't any work at Nogales, Arizona, but I told them to apply to C. F. Holler and Company and C. F. Holler and Company would send them wherever they were to go. I was a member of Holler and Company and hiring the men to go to work for Grant Brothers, or W. W. Carney. He is the man that spoke to us about gathering the men and who told us that he had a contract for the delivery of laborers to Grant Brothers. He told me that afternoon to go back with this bunch of laborers. I told him I was going to Hermosillo and he said "While you are there if you can scatter the word among those laborers that you fellows are hiring laborers there, it would be a good thing." I don't know whether it was on the first or the last trip that he said this. I don't remember
144 having told him about bringing up the first lot of men. He knew that those ninety men came. My memory is a little defective. On the morning when the last car of laborers came out I was in Hermosillo and saw Luis Sanchez, Ramon Felix and Gabriel

de Monteverde. I have examined the pictures, Plaintiff's Exhibits "3" and "4" of the men that were gathered in the car that morning at Hermosillo. I only knew one, Luis Sanchez. I didn't know the laborers at all, and would not recognize them if I saw them again.

Q. What if anything did you do that morning, with reference to the laborers in that car. State what you did, now?

Mr. DICKWEILER: The same objection.

The COURT: Overruled.

Mr. DICKWEILER: Exception.

A. I think I went in the car and counted them.

I don't remember how many there were. Luis Sanchez was not present when I counted them. The number made no impression on my mind, although we were going to get fifty cents a head. I think I saw Ramon Felix at the depot that morning. The men were below the station. The car was twenty or thirty yards from the depot, or station building.

Q. Now, what if anything did you do with reference to
145 arranging transportation for that car.

Mr. DICKWEILER: We offer the same objection.

The COURT: Overruled.

Mr. DICKWEILER: Exception.

I went to the agent and told him that there was a car ready to go to Nogales.

I am not sure whether I told him to telegraph W. W. Carney. I may have done so, however. I didn't know whether Mr. Carney had arranged for the transportation of these men. I am not sure whether I told the agent whether to wire W. W. Carney, but I was told by Mr. Carney to go to him and say "There is a car load- with laborers, and they are ready to go."

Cross-examination:

All the acts I did and all the speeches and statements that I have testified to I only made under arrangement with Mr. Carney. At the time Mr. Carney spoke to me in reference to giving me fifty cents in gold for each laborer, Mr. Carney stated to me what his instructions were from Grant Brothers Construction Company. Mr. Carney at that time told me that his instructions from Grant Brothers Company were not to have anything to do with Mexicans in
146 Mexico, but only to get men on the American side. He did not specify any nationality, but we were to get them on the American side. He told me that his instructions were that we must not get Mexicans or have anything to do with Mexicans in Mexico.

Redirect examination.

I remember this exactly. It was told me, or to Charley Holler and myself, more or less in that way. I don't know whether Charley Holler was present. I am not sure that Charley Holler was present, but I think he was. He didn't say this at the time he made this arrangement in the morning, and then afterwards

we spoke about the immigration officials. Charley, I think, knew something about the labor law and he told him how about getting those men out of Nogales, Arizona. If the laborers were Mexicans before they could go out of town, of Nogales, Arizona, with transportation of the company, they had to go and register, or give a statement of some kind in the immigration service. They would not allow a man to go out on the train if he had not presented himself at the Immigration Office, even when we were sending them by Benson. I am quite positive that Mr. Carney said to me that we were not to do anything with Mexicans in Mexico. I did not go to Hermosillo for the purpose of hiring laborers. I merely told them in the conversation that was going on, that Holler and Company
 147 were hiring laborers for the construction of these roads. I then thought that it would be wrong to go over to these Mexicans and say "I want you to go to Nogales and here is your transportation, and I am going to pay you a dollar and a half or two dollars" and to hire or engage them there, but I did tell them that I could not engage them or do anything with them until they had passed through the immigration service and presented themselves at C. F. Holler and Company, at Nogales, Arizona. I did not instruct the men as to what they should say in the immigration service after they were asked if they came over under promise of employment.

J. C. VINSON called as a witness by the plaintiff testified:

Direct examination:

My name is J. C. Vinson. I am auditor of the Arizona Eastern, Southern Pacific of Mexico and the Sonora Railway. The Sonora Railway is the railroad which extends between Nogales, Sonora and Hermosillo on down. It is the only line between those places. I was auditor of these companies on October 25th last year, and as such auditor I am custodian of all freight and passenger and ticket records, and of operation and disbursements. I have a record of the Sonora Railway, showing the transportation of a certain car of laborers from Hermosillo to Lomas on the 28th day of October last year. This is the conductor's cash fare report, and
 148 report of fares issued and the account trip passes and annual passes honored. This pass is listed "D-4870—Conductor's car and Tonnage Report." This trip pass is charged to our company account. It is a trip pass of the Ferrocarril Sonora Railway.

Pass marked for Identification "Plaintiff's Exhibit A."

Our record shows that it was charged to the account of the Sonora Railway. That is not billed against either the Southern Pacific Company of Mexico, which is a line that runs from Lomas east, and that is not charged to the account of Grant Brothers. The records do not show at whose instance this trip pass was issued. We have no data as to that. We only keep this as our authority for the passing of this number of men free. This is a free pass in Mexico. The contracts in effect at that time with Grant Brothers did not provide for furnishing of such a pass as this. I have some of the original

contracts here. At the time mentioned in October, there was no arrangement with Grant Brothers for the issuance of passes such as "Plaintiff's Exhibit A." There was some subsequent contract that don't bear on this, which contained a clause, which perhaps should be construed to mean that such a pass would be issued. I have the going stub of "Plaintiff's Exhibit 2." Our record shows that
 149 the company recognized that pass and acted on the portion of it that was used. This pass, both the going and returning portion, shows that it was issued on account of Grant Brothers, if I understand this word "Cunta." The record in our office shows that the amount for which these passes stand was not billed against Grant Brothers, but was handled in a book arrangement, by crediting to passenger revenue, and debiting to reconstruction job at one cent per mile. Those entries were simply book entries in order that our passenger revenue might get the benefit of a haul that would otherwise be deadheads. There was an arrangement at that time with Grant Brothers that under certain conditions their laborers would be carried free by our railroad, but this did not comply with the conditions. Nevertheless, it was recognized by our company, and the laborers passed on the strength of it.

Paper marked for identification "Plaintiff's Exhibit B."

Paper marked "B" for identification was recognized for passage by transporting G. S. Randall and twenty-nine from Nogales to Naco. The conductor, Fontis, on his conductor's collection report of the 29th shows that he honored pass 7143 from Nogales to Del Rio—thirty men. This was a round trip pass originally. The two papers marked for Identification "Plaintiff's Exhibit 2" were originally the same paper.

150 Mr. MORRISON: Now we offer, if Your Honor please, the paper marked "B" for identification.

Mr. DOCKWEILER: We object to the offer, upon the ground that the same is incompetent, irrelevant and immaterial and hearsay so far as the defendant in this case is concerned, and upon the further ground that by the evidence of the witness and by the testimony already in, produced by the Government, it is disclosed that that pass was not issued as the result of any contract or any agreement providing—entered into by the railroad company on the one hand, and the defendant on the other, providing for the issuance of that pass; and upon the further ground that the parties causing the pass to be issued and issuing the pass have not been identified—and recognizing the pass, either or all of them or any of them have not been established or disclosed by the evidence as capable or having authority to bind the defendant, either directly or indirectly, expressly or impliedly.

The COURT: It may be admitted for what it is worth.

Mr. DOCKWEILER: Exception.

Paper admitted and marked "Plaintiff's Exhibit 10" which is the same as "Exhibit B" for Identification.

I know W. W. Carney, but am not familiar with the arrangement he had for the issuing of passes of this nature, because the operating department places transportation wherever
 151

it is needed, and we only know of these passes when they turn in the train conductors' collections. Our records do not show, and I would not know to whom that pass was turned over.

Plaintiff's Exhibit "E" for Identification offered in evidence. Objected to by the defendant for the reason stated in the last one. Admitted by the Court and marked Plaintiff's Exhibit "11." Exception by the defendant.

I don't know whether Exhibit "11" was a round trip ticket. If this pass was issued by W. W. Carney I should have recognized it. This is the conductor's collection report which shows the cash on the one side collected, and the annual or other passes taken on his run.

Report marked for Identification Plaintiff's Exhibit "C".

On this report, Plaintiff's Exhibit "C" for identification is a record concerning pass No. 4870. It gives the name of a party whose name I cannot make out. It looks like "Blas Unat" or it may be one name and forty-five, and shows that the conductor honored this pass between Hermosillo and Lomas on train 21, October 28. The record does not show what became of the car at Lomas.

152 Paper marked Plaintiff's Exhibit "C" for identification offered in evidence by the plaintiff. Objected to by the defendant as incompetent, irrelevant and immaterial, and no foundation being laid therefor, it not having been shown that the party executing the document was authorized to execute the same by the defendant.

Document admitted by the Court and marked Plaintiff's Exhibit "12." Objection by the defendant. Exception by defendant.

I have a further record of the car brought under pass D-4870—being the passenger conductor's card of October 28th, showing he carried Sonora Car 2302 from Hermosillo to Lomas, contents, laborers.

Paper marked for Identification Plaintiff's Exhibit "D" and offered in evidence by the plaintiff. Objected to by the defendant on the grounds heretofore urged against the admission of the previous paper. Admitted by the Court and marked Plaintiff's Exhibit "13." Exception by the defendant.

I have conductor's car and tonnage report for the run of car 2302 from Nogales to Del Rio on October 29, but have no pass or order to cover that movement. Diligent search has failed to locate it. The number seems to have been charged to 2083, which was doubtless a clerical error. We have a conductor's collection report that stipulates

153 pass 7145 was honored with fifty men. It doesn't correspond in the number of men, but it shows that this pass, 7145, was honored from Nogales to Del Rio, on October 29, 1909. As these passes are issued in numerical order and 7143 being in evidence, it is assumed that 7145 was issued by the same parties as 7143. I have not the pass, although our records indicate that a pass was issued under which that car was transported from Lomas to Del Rio

over the old Cananea, Yaki River and Pacific, now the Southern Pacific of Mexico. I have made a careful examination of the records of our office but have been unable to find the pass, it might be in the office and not in the right place. The conductor should have turned in that pass, he is charged with carrying a car that he had no right to carry as far as the records show. I have records showing what became of the car after it reached Del Rio.

Paper marked as Plaintiff's Exhibit "E" for Identification.

I brought this (Exhibit "E" for Identification) in response to the subpoena because it is conductor Fontix's collection report in connection with his car and tonnage report of the same day and train. On account of the absence of the pass—7145 we cannot identify definitely this car and tonnage report with the conductor's collection report. I have the report of conductor Bennett of October 29, train No. 21, showing car 2302 as taken from Del Rio to Naco, showing the progress of the car.

154 Paper marked as Plaintiff's Exhibit "F" for Identification, and offered in evidence by the plaintiff, objected to by the defendant on the same grounds as made to the last Exhibits. Objection overruled and exception by the defendant. Paper marked Plaintiff's Exhibit "14."

I have no record showing the authority of conductor Bennett for taking the train from Del Rio to Naco. There is another trip pass, but, it does not say the number of men. It says, "Trip pass 7142, Del Rio to Naco," and "Trip pass 7143, Del Rio to Naco with thirty men. I have a record of a trip pass showing transportation of thirty men on the same day as the last one from Del Rio to Naco.

Paper marked as Plaintiff's Exhibit "G" for Identification and offered in evidence by the plaintiff. Objected to by the defendant on the same grounds as made to the last Exhibits. Objection overruled and exception by the defendant. Paper marked Plaintiff's Exhibit "15".

With the exception of the contracts which I have here, these are all the papers relating to the matter stated in the subpoena. I do not know whether or not Mr. Carney had authority to issue passes, I have no information on that subject. He is forwarding agent and carried on the construction department payroll as such to which his salary is entirely charged.

155 Cross-examination:

I have with me the original contracts between the Arizona and Colorado Railroad and Grant Brothers Construction Company in existence October, 1909, dated August 10, 1909, it covers transportation wholly within the United States and not in Mexico. The work done under this contract was between Pearce, Arizona, and Naco, in Cochise county. As far as my knowledge goes this is the only contract in force at that time respecting the execution of any work in the Territory of Arizona. I would not say absolutely that there is no other agreement, without knowing whether some of these

might be retrospective. I brought this contract in response to the subpoena as it seemed to cover the work for which these men were transported to Naco. I brought the other documents as being all that I have in connection with the firm of Grant Brothers. The Cananea, Yaki River and Pacific Railroad is not operating and never has done any work in the United States. The Southern Pacific Railroad Company of Mexico is not operating and never has done any construction work in the United States. These passes were not issued by virtue of the contract of August 10, 1909, between the Arizona and Colorado Railroad Company and the defendant. Under this contract Grant Brothers built some track between Pearce, Arizona, and Naco Junction wholly within Cochise County, Territory 156 of Arizona. This contract was duly executed.

Contract marked, Defendant's Exhibit "I" for Identification.
tion.

These passes which have been introduced in evidence were not charged on our books against Grant Brothers Construction Company nor did they pay for them in any manner. I couldn't say whether Grant Brothers have power to issue any passes over our Railroads in Mexico. A pass would have to be issued by the operating department to Grant Brothers, of which I would have no knowledge.

Redirect examination:

I don't know of my personal knowledge that practically free transportation is given Grant Brothers when engaged in construction work for the companies.

[Questions by the Court.]

Q. Well, as auditor of the Company, do you recognize—

A. If a pass would come to us, it would naturally be countersigned by a company official, and we would recognize that pass if we had the signature in triplicate in our office, of the counter-signature—for him countersigning it.

Q. How would you charge it, as a matter of accounting?

157 A. If it was wholly operating expenses, chargeable to the line in operation, we would have no charge; in other words, being issued free, we would have no money to charge out. If it came under work in construction we would charge that to the construction job, at the rate of one cent, gold, a mile, and credit passenger revenue that much.

Q. Now, where a pass comes in to you, if one should come in marked, "To the Account of Grant Brothers Construction Company," while Grant Brothers Construction Company were employed in constructing some line of railroad for your system, how would you charge that? What accounting process—?

A. We would charge that to the construction job on which Grant Brothers were working.

Q. Charge it to the work?

A. Charge it to the work,—yes sir.

Q. Why?

A. Under a ruling we have from Mr. Randolph, some time in 1908, to the effect that passenger revenue should not be deprived of its rightful revenue; at least a portion of the revenue, and giving as an offset—

Q. Is it under some arrangement made by—

A. A book arrangement, yes sir.

Q. Any arrangement made with the Construction Company, in the carrying of its laborers?

A. No, it has no connection with the contract of doing the work, or with the construction company. There might be an occasional pass that would be charged to some outside concern, but it is so—it is such an unusual occurrence that—

Q. As a matter of accounting, now, when a pass comes in as you say this did, marked on its face, "Charge to the account of Grant Brothers Construction Company," how would you recognize it?

A. We would first take into consideration that that was a free pass; that there was no money involved in it. If, in investigation, it proved to be in connection with a piece of construction work, we would at the end of the month assemble all those passes, work the mileage on them, and assess a rate of one cent, gold, per mile, on the aggregate mileage; crediting it to that, and charge to the construction job.

Q. In no event, or under no circumstances, would it be charged to or enter into the account of the company with the construction company.

A. It would not.

Mr. BAKER: In no event, at all?

A. In no event at all.

Q. Simply as a gratuity to the construction company?

159 A. I would say in answer to that, if we were going to charge it to Grant Brothers, that there would be a revenue ticket sold, and that ticket would be billed against Grant Brothers at its face value, tariff rates, unless our general passenger agent issued a rate order at a reduced rate.

Mr. DOCKWEILER: In that case, it would be charged at the reduced rate?

A. It would.

So far as I know I have brought all the contracts covering the periods of 1909 and 1910. The companies may have had verbal or written arrangements with Grant Brothers that I know nothing of.

Plaintiff's Exhibit "10" and "11" translated to the jury.

GEORGE O. HILZINGER recalled as a witness by the plaintiff, testified:

Plaintiff's Exhibit "11" translated from the Spanish into the English language reads: "Sonora Railway. Pass A. Castenada and 45 laborers, subject to conditions on back hereof, from Hermosillo to Lomas, Account laborers. Not good unless countersigned by H.

J. Temple. Dated October 28, 1909. Void after October 28, 1909. R. H. Ingram, Auxiliary General Manager. No. D-4870. Counter-signed by H. J. Temple."

The back reads precisely the same as Plaintiff's Exhibit 160 "2." Plaintiff's Exhibit "10" translated from the Spanish into the English language reads: "Cananea, Yaki River and Pacific Railroad. Pass going G. S. Randall and twenty-nine from Nogales to Naco; account Grant Bros. Con. Co. Issued by J. A. Small in accordance with the annexed pass. Void if detached No. 7143." I can't read the writing on the back, the best I can make out is: "Nogales to Del Rio., No. 52, Fontis, 10—29."

— FONTES called as a witness by the plaintiff testified:

My name is — Fontes. On the 28th and 29th of October, last year, I was conductor on the Sonora Railroad, a line running from Guaymas and Hermosillo to Nogales, I was running on the Del Rio branch operated by the same people. I would complete my trip on the same day. I am now running from Nogales to Del Rio. I did not see W. W. Carney on the 29th day of October, 1909, but I saw him the next day. On the morning of the 29th I went out on my usual trip from Nogales, Sonora, with a mixed passenger and freight train. Under instructions from the chief dispatcher I picked up a car of laborers from Lomas to Del Rio. I counted forty laborers in that car, but there were about fifty to fifty-four. I observed a bunch of about twenty-eight to thirty laborers going from Nogales to Lomas. I have known Gustavo Randall about six
161 or seven years, the laborers were in his care. Plaintiff's Exhibit "10" is one of the parts of the passes handed to me by Randall, taken up before I reached Lomas, and on which I transported a party of twenty-nine men out of Nogales. Plaintiff's Exhibit "2." now detached was the other part of the pass Randall had. I was not supposed to detach it and did not do so, it was supposed to go on the road between Cananea and Naco after leaving Del Rio. The car I picked up at Lomas after reaching Del Rio was picked up at Del Rio and taken to Naco. Mr. Dick Bennett was the conductor of the train that took the car to Naco. The message from the Chief dispatcher read to pick up a car at Lomas and take it to Rio and get regular pass from W. W. Carney when I came back to Nogales. I got the pass the next morning from Carney after I came back. I turned that pass in to Mr. Vinson the Auditor with my report the next day in the regular order. I believe I sent the report in the same day, but as I did not get the pass until the next day I sent that in the next day. I do not know where that pass is now but I sent it to the auditor Mr. Vinson.

Q. Go ahead now and state what your recollection is as to the contents of that pass which you got from Mr. Carney.

Objected to by the defendant on the grounds made previously to the introduction of passes. Objection overruled and ex-
162 ception by the defendant.

I don't remember exactly whether the pass Lomas to Naco read fifty or fifty-four, it was exactly similar to Plaintiff's Exhibit "10."

Cross-examination:

The pass read from Nogales to Naco for one man and fifty-four or fifty-five, I don't know the number. It is supposed to be signed by somebody. The handwriting on it was supposed to be in ink otherwise I could not accept it under the rules of the company. I don't remember the name of the man in charge, his name, or somebody's name was on the back and fifty-four or fifty-five. I don't remember whether after the word "cuenta" laborers or Grant Brothers was written. It was six or seven months ago and we have those passes every three or four days. Most of the passes read "labor" after the words "A cuenta." I don't remember which this pass was. After the word "Pase" fifty or fifty-four was written, and after the word "desde" Del Rio, and after "a" the word Naco. I don't know whether the twenty-nine men I picked up at Nogales came from Nogales, Arizona, or Nogales, Sonora, our train leaves Nogales, Sonora, and they were on the train. The road on which I worked operates exclusively in Mexico.

163 Redirect examination:

As far as I know the men from Nogales, Sonora, went to Del Rio. I heard about the circumstance of a large number of aliens being arrested at Naco, but don't know what they were arrested for.

G. W. BENNETT called as a witness by the plaintiff, testified:

My name is G. W. Bennett, I am a railroad conductor. On the 29th day of October, last year, I was on a run between Naco and Cananea on which line is a station called Del Rio. I would have to refer to my records to know what occurred at Del Rio that day with reference to picking up a car. I forwarded my records to the auditor of the C. R. Y. & P. Plaintiff's Exhibits "14" and "15" bear my signatures, from which it appears that I picked up car 2302 at Del Rio and took it to Naco on October 29, 1909. And I show up a trip pass, 7143, for thirty men from Del Rio to Naco, and a trip pass, 7142, for one man from Del Rio to Naco. 7143 was for thirty people. I could not identify Plaintiff's Exhibit "2," I have seen Plaintiff's Exhibit "10," it has my punch mark on it. It must have been attached to Plaintiff's Exhibit "2." Some one on the train presented it, but I do not recall who it was, I did not know the party. The hauling of the car from Del Rio to Naco is not necessarily

164 connected with this pass. I couldn't say that I had other instructions regarding the carrying of the car from Del Rio to Naco but must have had some instructions, verbal or otherwise. These records do not show any instructions. In handling laborers it frequently occurs that we are instructed by some one in authority to pick up a car of laborers and take it from one place to another and get transportation later to avoid delay. My report for the next

day might show whether I got transportation later but this does not show it. My records show that I did carry the car to Naco. I don't remember that Mr. Fontes was conductor from Lomas to Del Rio that day, it is possible that he told me that he had been given orders by the general dispatcher at Nogales to carry that car, and if I carried it to Naco he would get transportation the next day at Nogales.

Cross-examination :

Any instructions I may have had about that car from Del Rio to Naco must have come from the company and only from them; if a fellow conductor said to take it, I would take it on his verbal——. I carried that car to the United States custom house at Naco, across to the United States. I don't know that it is the custom to carry laborers that way across in front of the United States custom house.

165 **Redirect examination :**

No case like that has come to my knowledge before. There was one shipment of laborers through to Nacozari, who were said to be in bond, that was the expression used. I have been running up and down that line for several years.

Mr. MORRISON: I will offer the depositions at this time.

The COURT: The motions to suppress the depositions will be overruled and denied as to each of them.

Mr. BAKER: Note an exception.

Deposition of Miguel Zazueta.

[Copy of the notice filed in the U. S. District Court of the First Judicial District, April 27, 1910, and before shown in Abstract.]

My name is Miguel Zazueta. I am thirty-four years of age, citizen of Mexico, a laborer; and live in Hermosillo. I have known C. J. Rupelius about twelve or thirteen years. In the latter part of September he employed me in Hermosillo to go to the United States of America and work for Grant Brothers on a railroad grade, between Cochise and Naco.

The COURT: Now as I understand, this is not offered for the purpose of showing the substance of the offense charged in
166 the complaint?

Mr. MORRISON: Quite correct, Your Honor. This is a separate and prior transaction, entirely. This is not one of the men that we have charged.

Mr. BAKER: I object to interrogatory No. 5, for the reason that the same calls for a conclusion of the witness, is immaterial and irrelevant, and the answer of the witness states a conclusion and matters not within the personal knowledge of the witness, and purports to give a wild conclusion of the witness.

The COURT: I will overrule the objection to the question.

Mr. BAKER: I move to strike out the answer, for the same reasons—I suppose the objection to the interrogatory is overruled?

The COURT: Yes.

Mr. BAKER: I except to the ruling of the Court.

“Answer to Interrogatory No. 5.—We went to the United States by the Southern Pacific Railroad; I mean the railroad from Hermosillo to Nogales; Mr. Rupelius gave the conductor a pass for all of us.”

167 Mr. BAKER: Now I move to strike out the answer of the witness to the interrogatory, and to exclude it, for the reason that the same is a conclusion of the witness and the witness, in his answers, states a conclusion, and states matters not within the personal knowledge of the witness, and purports to give orally the contents of a written instrument, without a proper foundation having been laid therefor.

The COURT: The motion is denied.

Mr. BAKER: Except.

“Interrogatory 6.—If you have stated that you and said other Mexican citizens proceeded to the town of Nogales, Sonora, state what, if any, instructions you received from said Rupelius with reference to entering the United States of America.”

Mr. BAKER: I object to Interrogatory No. 6, for the reason that the same is immaterial and irrelevant, and the answer of the witness states a conclusion and is not a statement of facts, and attempts to state matters not within the knowledge of the witness; and, further, that it is not responsive to the question.

The COURT: I will overrule the objection to the question.

“Answer to Interrogatory No. 6.—When we reached Nogales, Sonora, he told us to get out of the cars, and told us to break up into small parties and then cross into the United States of America a few at a time.”

168 Mr. BAKER: We move to strike out the answer of the witness, for the reason that the same is immaterial and irrelevant; it states a conclusion and it is not a statement of fact. It attempts to state facts not within the knowledge of the witness, and is not responsive to the question.

The COURT: Overruled.

“Interrogatory 7.—If you shall have stated that you and said other Mexican citizens did proceed to the town of Nogales, Sonora, from the city of Hermosillo, Mexico, or thereabouts, and that you entered the United States of America in small groups under the instruction of said C. J. Rupelius, state if you had further instructions from said Rupelius as to the firm in Nogales, Arizona, to which you should apply for further information or instructions.”

Mr. BAKER: The defendant objects to Interrogatory No. 7, for the reason that the same is immaterial and irrelevant; it calls for a

conclusion on the part of the witness and calls for matters not within the knowledge of the witness.

The COURT: Overruled.

"Answer to Interrogatory No. 7.—Rupelius told us to go to Holler and Company, of Nogales, Arizona, and ask for work; so we did break up into small parties and crossed over into the United States a few at a time; Rupelius was a member of the firm of Holler & Company."

169 Mr. BAKER: We move to strike out that answer, for the reason it is a conclusion of the witness, and is not responsive to the inquiry.

The COURT: Some part of it, perhaps, does state a conclusion; but as I understand it, your motion is directed to the entire answer?

Mr. BAKER: Yes sir.

The COURT: It may stand.

"Interrogatory 8.—If you have stated that while in the state of Sonora, Mexico, you were instructed by C. J. Rupelius to proceed to the office of C. F. Holler & Company for further instructions and information immediately upon your entering the United States of America, state whether or not you did apply to said last named firm, and if so what arrangements were made with you and said Mexican citizens at the office of said C. F. Holler & Company of Nogales, Arizona, if any."

Mr. BAKER: We object to the question, for the reason that it is leading and suggestive; that it is immaterial and irrelevant; that it calls for a conclusion of the witness; and for the further reason that no act of Holler & Company in connection with this particular witness could be possibly binding upon the defendant, there being no proof of any connection between Holler & Company and the defendant; and, furthermore, I object to the question for this

170 reason, may it please the Court—and I wish to state this objection a little more at length: The whole object and purpose and reason why this character of testimony is admissible at all is for the purpose of conveying knowledge to the defendant—a general course of transaction upon this matter; but the details of the transaction are never admissible.

The COURT: To show system?

Mr. BAKER: Yes; you cannot enter into the details of the matter. You may prove the substantive matter for the purpose of showing the matter in fact, but the circumstances surrounding the matter are not admissible under that rule of evidence; and for that reason I object to these details.

The COURT: You may read the answer.

"Answer to Interrogatory No. 8.—Yes, we did apply to Holler & Company in Nogales, Arizona, for work, and Charles Holler employed us again to go to work on the grade then being built by Grant Brothers between Cochise and Naco for the same wages that Mr. Rupelius had promised us in Hermosillo."

Mr. BAKER: We move to strike out the answer to Interrogatory

No. 8, for the reason that it is not responsive to the question, is a conclusion of the witness, and because it improperly states in detail.

The COURT: Overruled.

171 Mr. BAKER: Exception.

"Interrogatory 9.—If you have stated that you did proceed to the office of C. F. Holler & Company of Nogales, Arizona, state what you did immediately thereafter with reference to going to work for any person, firm or corporation."

Mr. BAKER: Now we object to that question, may it please the Court, as immaterial and irrelevant. Any act that he might have done in going to work is not binding upon the defendant, and it is immaterial and irrelevant. He went to work anyhow.

The COURT: The question may be answered

Mr. BAKER: Exception.

"Answer to Interrogatory No. 9.—The day after we were asking the work from Holler & Company they put us in two cars and took us to the grade between Cochise and Naco and we went to work for Grant Brothers Construction Company.

[Copy of certificate of Louis Hostetter as returned with deposition, May 20, 1910, and before printed in full in Abstract.]

A. J. WAMSLEY called as a witness by the plaintiff testified.

My name is A. J. Wamsley. On the 28th day of October last year I was conductor running a passenger train on the Sonora road between Guaymas and Nogales. I recollect picking up a
172 car at Hermosillo and attaching it to my train. Plaintiff's Exhibit—"12" and "13" bear my signature. It is a record which I made on October 28 last year. These records show that car No. 2302 was picked up at Hermosillo. The record indicates that I had a pass, but do not recall that. As shown by my record the number of the pass was D-4870. Exhibit "11" bears mark No. 4870 and has my punch mark, and must be the pass to which my record refers. I cannot state from whom I got that pass, or whether or not I got it at Hermosillo or Nogales. I don't know who was in this car, but they were Mexicans in appearance, in the neighborhood of forty.

Deposition of Alberto Ruiz.

[Copy of the notice filed in the United States District Court of the First Judicial District, April 27, 1910, and before shown in abstract.]

My name is Alberto Ruiz. I am twenty years of age; a plasterer by trade and live in Hermosillo. On the 29th of October, 1909, I was a citizen of the United States of Mexico, being a native born citizen. On the 28th of October, 1909, I went from Hermosillo, Mexico, to Lomas, Mexico, and to Naco, Arizona, arriving at Naco on the 29th.

Interrogatory 5.—If you have stated that you did make the

journey was described in the last preceding interrogatory on or about the 28th and 29th days of October, 1909, state what was
173 the purpose of your taking such journey."

Mr. BAKER: We object to that question, particularly that part of which says, "State what was the purpose of your taking such journey," for the reason that it requires the witness to state, and the answer does state, his motive and intent; and, further, that the answer is not responsive to the question.

The COURT: The objection to the question is overruled.

Answer to Interrogatory No. 5.—Went to work on the railroad grade in the vicinity of Bisbee, Arizona.

Mr. BAKER: We move to strike out the answer for the reason that it states the intent and motive of the witness, which is immaterial and irrelevant, and further, that the conclusion of the witness is stated by his answer; and for the further reason that the answer is not responsive to the inquiry.

The COURT: The motion is overruled.

Mr. BAKER: Exception.

"Interrogatory 6.—If you state in answer to the last preceding interrogatory that you proceeded to the United States of America to go to work, state who, if any one, employed you, and where you were employed, and what the terms of your employment were."

174 Mr. BAKER: We object to that, for the reason that it calls for the conclusion of the witness, and is leading and suggestive.

The COURT: It may be answered.

Mr. BAKER: The Interrogatory is leading and suggestive and calls for a conclusion of the witness. Exception.

The COURT: I don't think it is objectionable.

"Answer to Interrogatory No. 6.—I was employed by Mr. Luiz Sanchez, at the depot at Hermosillo; I was to work in Arizona on railroad grade near Bisbee, and my wages were to be \$2.25 American money. He told me to get on the car."

Mr. BAKER: We move the Court to strike out that answer, for the reason it is not responsive to the question, and states a conclusion of the witness; and the answer is vague and uncertain.

The COURT: Well, I don't see that it is open to that motion, Judge Baker; Your motion is denied.

Mr. BAKER: Except.

I went in a day coach. About forty other men went in the same coach. I don't know who paid my transportation. I did not.

When the car reached Lomas it stopped there all night. A
175 big tall man, I don't know his name assumed charge of our party after it reached Lomas, Mexico. I did enter the United States of America on October 29, 1909, and was examined by the Immigration officers at Naco, Arizona, on the 29th and 30th of October. A photograph was taken of a party of men, including

myself. It was the party, of which I was a member, which came from Hermosillo, Mexico, of which I have been speaking.

"Interrogatory 17.—State if you know whether the other persons who came with you from Hermosillo, Mexico, to Naco, Arizona, on or about the 28th and 29th days of October, 1909, were employed to work in the United States of America. If so, state if you know what the terms of their employment were, and where they were employed."

Mr. BAKER: We object to that question, as immaterial and irrelevant, and calling for a conclusion of the witness.

The COURT: Overruled.

Mr. BAKER: Exception.

"Answer to Interrogatory No. 17.—The other persons in the car with me were also employed to work at the same place in Arizona."

Mr. BAKER: We move to strike out that answer, because it is a statement of a conclusion of the witness.

176 The COURT: It may stand.

Mr. BAKER: Exception.

I do not know of my own knowledge of what country the other members of the party were citizens. They were all put on the car at Hermosillo. They were all Mexicans.

Copy of certificate of Louis Hostetter as returned with deposition, May 20, 1910, and before printed in full in abstract.

Deposition of Manuel Escobosa.

(Copy of the notice filed in the United States District Court of the First Judicial District, April 27, 1910, and before shown in abstract.)

My name is Manuel Escobosa. I am seventeen years of age; a laborer, living in Hermosillo and was a native born citizen of the United States of Mexico on the 29th day of October, 1909. I came from Hermosillo, Mexico, to Lomas, Mexico, and to Naco, Arizona.

"Interrogatory 5.—If you have stated that you did make the journey described in the last preceding interrogatory on or about the 28th and 29th days of October, 1909, state what was the purpose of your taking such journey."

Mr. BAKER: We object to that question, as immaterial and irrelevant. His purpose cuts no figure in the matter at all; and it is leading and suggestive.

177 The COURT: He may answer.

Mr. BAKER: Exception.

"Answer to Interrogatory No. 5.—My purpose in going to the United States at that time was to work for the company which was building a railroad grade some distance out from Douglas, Arizona."

Mr. BAKER: We move the Court to strike out that answer, as

immaterial and irrelevant; and furthermore, it is not responsive to the inquiry.

The COURT: The motion is denied.

"Interrogatory 6.—If you state in answer to the last proceeding interrogatory that you were proceeding to the United States of America to work, state who, if any one, employed you, and where you were employed, and what were the terms of employment."

Mr. BAKER: We object to that question, as immaterial, irrelevant, leading and suggestive.

The COURT: Overruled.

"Answer to Interrogatory No. 6.—I was employed at Hermosillo, Mexico, by Luis Sanchez to work as a laborer for the company which was building a railroad grade some distance out from Douglas, Arizona, and my wages were to be \$1.25 a day in American money.

I had no intention of going to the United States until I was
178 employed as I have just stated, and I went solely on account of the work and wages offered me."

Mr. BAKER: We move to strike out that answer, for the reason that it is not responsive to the inquiry, and for the reason that it states a conclusion of the witness; and for the further reason that any employment of this witness made by Luis Sanchez, is not binding upon the defendant, in any sense or in any way, there being no pretense of any connection of this defendant with one Luis Sanchez.

The COURT: Well, there is testimony, Judge, of Mr. Ruppelius, that he made some arrangement or had some transaction with Mr. Sanchez.

Mr. BAKER: Well, now, if it please the Court, I don't want to consume the time of the Court, but I submit the proposition that it seems to be impossible as a legal matter that liability of a party can be caused by the transfer ad infinitum, for if it can be done to the third party, it can be done to the fourth and fifth generation, by transmitting by word of mouth from one man to another, under this contract, so as to reach a large number of men—possibly twenty or thirty. Is it possible that the defendant is bound by what the man last said and did?

The COURT: If they ratify it and accept it, I should think they would be.

179 Mr. BAKER: Now that is the proposition that I wanted to make to the Court—simply that anything Luis Sanchez did in this case, would not be binding upon the defendant. I move to strike the answer out, for that reason.

The COURT: Well, in my view of it, it is a question for the jury to determine, upon the entire testimony, whether he was authorized by the company to employ laborers, or secure them, if they did employ any, and therefore the motion is denied.

Mr. BAKER: Exception.

I went on a railroad car from Hermosillo, Mexico, to Naco, Arizona. There was about forty other men in the car with me. I do not know who paid my transportation; I did not. The car was

side-tracked at Lomas, Mexico, all night. About nine o'clock that night two men came in a carriage with provisions for us. Nicolas Casteneda was in charge of our party as far as Lomas. I do not know who assumed charge after that. I entered the United States of America on October 29, 1909, and was examined by the Immigration officers at Naco, Arizona. A photograph was taken of a party, among which was myself, and which was the same party which came from Hermosillo, Mexico. All of the men whose pictures are in this group, with the exception of two American guards in the middle, were in the car with me, and came from Hermosillo to Naco at the same time I did to work for the company, 180 which was building the railroad grade I have spoken of. They were all Mexicans and were employed by Luis Sanchez, some for the same and some for higher wages.

Copy of certificate of Louis Hostetter as returned with deposition, May 20, 1910, and before printed in full in abstract.

Deposition of Jesus Guevarra.

(Copy of the notice filed in the District Court of the First Judicial District, April 27, 1910, and before shown in abstract.)

My name is Jesus Guevarra. I am eighteen years of age, a laborer by occupation, living in the City of Hermosillo, and was a native born citizen of the United States of Mexico, on the 29th day of October, 1909. On the 28th and 29th of October, 1909, I came from Hermosillo, Mexico, to Lomas, Mexico, and to Naco, Arizona.

"Interrogatory 5.—If you have stated that you did make the journey described in the last preceding interrogatory on or about the 28th and 29th days of October, 1909, state what was the purpose of your taking such journey."

Mr. BAKER: We object to it, as immaterial and irrelevant.

The COURT: Overruled.

Mr. BAKER: Exception.

181 "Answer to Interrogatory No. 5.—The purpose of my going on that trip was to go to work for Grant Brothers Construction Company on the grade between Cochise and Naco Arizona."

Mr. BAKER: We move to strike the answer out, if it please the Court, as not responsive to the inquiry, immaterial and irrelevant.

The COURT: It is responsive isn't it?

Mr. BAKER: Yes, I believe it is.

The COURT: It may stand.

"Interrogatory 6.—If you state in the answer to the last preceding interrogatory that you proceeded to the United States of America to go to work, state who, if any one, employed you, and where you were employed, and what the terms of your employment were."

Mr. BAKER: We object to it, may it please the Court, as immaterial and irrelevant.

The COURT: Overruled.

"Answer to Interrogatory No. 6.—I was employed in Luis Sanchez in Hermosillo, at the railroad station; he employed me to work on that grade for \$1.75 a day in American money."

Mr. BAKER: We move to strike the answer out on the ground that no action of Luis Sanchez can be or is binding upon the defendant in the case, there being no connection shown between this defendant and one Luis Sanchez.

182 The COURT: Overruled.

I went from Hermosillo to Naco in a car with about forty other men. I do not know who paid my transportation. I did not. The car was side-tracked all night at Lomas, Mexico. Nicolas Casteneda was in charge of the party as far as Lomas. I do not know who assumed charge after that. I entered the United States of America on the 29th and was examined by the Immigration officers on the 29th and 30th of October, 1909, at Naco, Arizona. A photograph was taken of the party. All the men in the party came with me in a car from Hermosillo to Naco, Arizona.

"Interrogatory 17.—State if you know whether the other persons who came with you from Hermosillo, Mexico, to Naco, Arizona, on or about the 28th and 29th days of October 1909 were employed to work in the United States of America. If so state if you know what the terms of their employment were and where they were employed."

Mr. BAKER: We object to the question, as immaterial and irrelevant and calling for a conclusion of the witness.

The COURT: It may be answered.

Mr. BAKER: Exception.

"Answer to Interrogatory No. 17.—The rest of them who came in the car with me were also employed to work for Grant
183 Brothers on the grade of which I have spoken, for about the same wages which I was to receive."

Mr. BAKER: We move the Court to strike out, now, this part: "Also employed to work for Grant Brothers on the grade of which I have spoken, at about the same wages which I was to receive," as not responsive to the inquiry.

The COURT: The motion denied.

Mr. BAKER: Exception. And also, that it is a conclusion of the witness and not a statement of any fact.

The COURT: It may stand.

"Interrogatory 18.—State if you know of what country the other members of the party, of which you were a member, which came from Hermosillo, Mexico, to Naco, Arizona, on or about the 28th and 29th days of October, 1909, if you say such party did make such journey on or about the dates last mentioned, were citizens on or about the 28th and 29th days of October, 1909."

Mr. BAKER: We object to that question, as it calls for, it strikes me, a knowledge too profound for the witness to know; it calls for a conclusion.

The COURT: He may answer if he knows.

Mr. BAKER: Exception.

"Answer to Interrogatory No. 18.—They were all Mexicans."

184 Mr. BAKER: We move to strike out that answer, as a conclusion.

The COURT: The motion is denied.

Mr. BAKER: Exception.

(Copy of certificate of Louis Hostetter as returned with deposition, May 20, 1910, and before printed in full in abstract.)

Deposition of Mateo Ortiz.

[Copy of the notice filed in the United States District Court of the First Judicial District, April 27, 1910, and before shown in abstract.]

My name is Mateo Ortiz, I am twenty-six years of age; a merchant, and live in Hermosillo. I have known C. F. Holler for about three years and C. J. Ruppelius for about a year and a half. I saw Mr. Ruppelius in Hermosillo two or three times prior to the 29th of October, 1909.

"Interrogatory 4.—If you have stated in answer to the last preceding interrogatory that you did see C. J. Ruppelius in Hermosillo, Mexico, on several occasions prior to the 29th day of October, 1909, state if you know what Mr. Ruppelius was doing in the city of Hermosillo and vicinity. State fully and in detail everything that you know of your own knowledge and your means of knowledge concerning C. J. Ruppelius' business in Hermosillo and vicinity at the same time he was in the said city of Hermosillo."

185 Mr. BAKER: We object to that, as immaterial and irrelevant.

The COURT: Overruled.

Mr. BAKER: Exception.

"Answer to Interrogatory No. 4.—Mr. Ruppelius' business here in Hermosillo, Mexico, in the fall of 1909, was to get laborers to work for Grant Brothers Construction Company, on their railroad grade in Arizona. I know this because he told me and many other people that this was what he was here for."

Mr. BAKER: We move to strike that out, if it please the Court, as hearsay and as not binding on the defendant in the case, and anything that Ruppelius might have said or done is not binding upon the defendants in the case.

The COURT: The motion is denied.

Mr. BAKER: Exception.

"Interrogatory 6.—If you have stated that C. J. Ruppelius endeavored to secure laborers to work on a railroad then being constructed in Arizona, state what success, if any, if you know, attended the efforts of said Ruppelius."

Mr. BAKER: We object to that, as immaterial and irrelevant.

The COURT: Overruled.

Mr. BAKER: Exception.

186 "Answer to Interrogatory No. 6.—As a result of the offers of better wages which Mr. Ruppelius paid to laborers here in Hermosillo, Mexico, he gathered together several parties of Mexican laborers and shipped them from Hermosillo; one of those parties left here about the 28th or 29th of October, 1909. I fixed the date because I paid an order of that date, I mean October 29th, which order Mr. Ruppelius gave upon my firm in favor of Cohen Hotel for thirteen pesos. I have the order but it belongs to my firm files and I do not care to attach the original to this deposition, but I do attach to this deposition a correct copy of that order which the officer who is taking this deposition has marked Plaintiff's Exhibit "B."

Mr. BAKER: We move to strike that answer of the witness away, for the reason—

Mr. MORRISON: We suggest that we are probably entitled to read the order to the Court, so that the Court will be fully informed upon it.

The COURT: You would better wait a moment.

Mr. BAKER: I move to strike the answer away, as not responsive to the inquiry, and for the reason that anything that Mr. Ruppelius may have said is not binding upon the defendant.

The COURT: I will deny the motion.

187 Mr. BAKER: Exception.

I know C. J. Ruppelius was a member of the firm of Holler and Company during October, 1909.

[Copy of certificate Louis Hostetter as returned with deposition, May 20, 1910, and before printed in full in abstract.]

Deposition of Manuel Tona.

[Copy of the notice filed in the United States District Court of the First Judicial District, April 27, 1910, and before shown in abstract.]

My name is Manuel Tona. I am twenty-three years of age; a laborer, living in Hermosillo, and on the 29th day of October, 1909, was a native born citizen of the United States of Mexico. On that day I came from Hermosillo, Mexico, to Lomas, Mexico, and to Naco, Arizona.

"Interrogatory 5.—If you have stated that you did make the journey described in the last preceding interrogatory on or about the 28th and 29th days of October, 1909, state what was the purpose of your taking such journey."

Mr. BAKER: We object to that question, as calling for the purpose and intent of the witness, and immaterial. It is leading and suggestive and immaterial.

The COURT: It may be answered.

188 "Answer to Interrogatory No. 5.—I went to work in the United States of America on grade that was being built in Arizona, a little way out from Naco, Arizona; this was my only purpose in going.

Interrogatory 6.—If you state in answer to the last preceding interrogatory that you were proceeding to the United States of America to go to work, state who, if any one, employed you, and where you were employed and what the terms of your employment were."

I was employed by Luis Sanchez at the railroad station in Hermosillo to work for the company that was building the grade. I was to get two dollars a day, American money. I went in a railroad car from Hermosillo as far as Lomas and from there over to the railroad to Naco, Arizona, with about forty other men in the same car. I do not know who paid the transportation. I did not. The car was sidetracked at Lomas, where it remained all night, and was picked up by the regular train next morning and taken to Naco, Arizona. Nicolas Casteneda was in charge of the party as far as Lomas. I do not know who was in charge after that. I entered the United States of America on the 29th of October, 1909. A photograph was taken in Naco, Arizona, of this party, which came from Hermosillo to Naco. In the picture handed me my picture appears as number "20,"

and is a picture of the party of which I have been speaking.
189 Interrogatory 17.—State if you know whether the other persons who came with you from Hermosillo, Mexico, to Naco, Arizona, on or about the 28th and 29th days of October, 1909, were employed to work in the United States of America. If so, state if you know what the terms of their employment were, and where they were employed.

Mr. BAKER: We object to that question, as leading, suggestive, immaterial, irrelevant and calling for a conclusion of the witness.

The COURT: It calls, I think, for his knowledge on the subject; so he may answer.

Mr. BAKER: Exception.

All the men who came with me from Hermosillo and who are in the picture I have spoken of were employed in Hermosillo, Mexico, by Luis Sanchez to work on the grade in Arizona, near Naco, for the company that was building the grade, and they were to receive about the same wages as myself.

[Copy of certificate of Louis Hostetter as returned with deposition, May 20, 1910, and before printed in full in abstract.]

RAMON FELIX, called as a witness by the plaintiff, testified:

My name is Ramon Felix. I live, and have lived, in Hermosillo all my life. On the 27th, 28th and 29th of October, last 190 year, I was in Hermosillo, registered at the depot. I know C. J. Ruppelius, and saw him in Hermosillo about those dates.

Q. Did you have any conversation with him at that time? If so what was it?

Mr. DOCKWEILER: We object to the question, on the ground that the same is incompetent, irrelevant and immaterial and no foundation laid therefor, and it is not within the issues in this case, and it not having been shown that C. J. Ruppelius was qualified, directly or indirectly, expressly or impliedly, or authorized to bind the defendant corporation.

The COURT: The objection is overruled.

Mr. DOCKWEILER: Exception.

A. I saw him in Hermosillo and talked with him two words.

I helped Mr. Sanchez to take the people to the station. I had no conversation with him prior to that. I was working with my wagons in the city, and I helped Mr. Sanchez take the people to the depot. Nothing happened that morning. I was coming along with a party and I asked him for a few cents, and he replied that he would give me some money at Nogales. Ruppelius had advised me a few days before to get the people ready down there to bring them to Nogales.

After he told me this I notified the people to be ready till the 191 time that Mr. Ruppelius would notify them. I notified the men and sent them from the center of the town to the depot.

Mr. Archides came there in the morning and he and Mr. Sanchez put the names down at the station. After the names were put down I went to the center of the town and when I was coming back towards the depot the train pulled out. I had nothing to do with the transportation. I saw a number of the men that went in that car that morning and knew them personally; I would know some of them if I saw them again. On Plaintiff's Exhibit "3" I recognize number one as Eduardo Rivera, my brother-in-law, number two, Jose Acuna; number three, I only know by sight as one of that party of laborers at Hermosillo; number four, I don't know by name, I know him by sight only, he got on the car that morning at Hermosillo; number five, I don't know his name; he belongs in towns in the interior of Mexico, he was in that gang of men in Hermosillo that morning; number six, I do not know, he is a very small boy; number seven, I don't know either his name or by sight. I didn't see them in that party of laborers that morning. I don't know number 8. Number nine is Manuel Mejia. He lives on Alameda Street, he was in that party of laborers that morning. I don't know number ten either by name or by sight, and do not know whether he was in that party that morning. Number eleven was a little short-haired fellow, I do not know him, I saw him, but I don't re-

192 collect him; number twelve I don't even know by sight and don't know whether he was in that party that morning. I don't know number thirteen, I saw him coming away in the train

that morning with the party; number fourteen I know very well by sight, but he was together with the others on the train. I don't know number fifteen and don't remember whether he was in the party; number sixteen I know by sight; number seventeen I do not know and do not know whether he was in the party. I know number nineteen and he was in the party. With reference to the picture and the numbers as they appear thereon, twenty is Manuel Tona; thirty-two or thirty-three is Francisco Corrales; thirty-nine I know by sight only around Hermosillo, and I don't know him by name; number thirty I know by sight, he hauls water around Hermosillo. I can't recognize any others.

Q. The men that you have mentioned—what if anything had you told them about Mr. Ruppelius' conversation with you about getting work?

Mr. DOCKWEILER: We object to that question on the ground that the same is incompetent, irrelevant and immaterial, no proper foundation having been laid therefor, and it is purely hearsay so far as the defendant is concerned, and not within the issues of this case; and upon the additional ground that anything said by and between this witness and Ruppelius or this witness to any of the men he has just referred to, or by Ruppelius to any of the men he has referred to, or to himself, cannot bind the defendant corporation in any respect whatsoever.

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The COURT: Overruled.

Mr. DOCKWEILER: Exception.

Q. Answer the question.

A. I didn't say nothing to them, only said, "Boys, if you want to go to Nogales, Sonora, Mr. Urquides will come here after a gang of people to take to Nogales, Sonora." That is all I said to them.

Cross-examination.

I now reside at Hermosillo. The last time I came into the United States was on the 30th of last month. I came at the request of Mr. Morrison. Before this time I had only been as far as Nogales. I have seen this photograph three times before testifying today, in Hermosillo. I had that photograph more or less three quarters of an hour in my possession. I did not see that photograph prior to taking the witness stand in Tucson. When examining that photograph at Hermosillo I was not told the names of the various parties, but those names I have mentioned have all worked in my business. Altogether it couldn't be more than two hours that I have had that picture for examination; while I had the picture no suggestion as to the names or identity of any party was made to me.

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Redirect examination.

Ruppelius at first sent me word to gather so many people and send them to him. I got them and sent them, and he never paid me for them. I talked with him about it myself.

Q. Go ahead and say what occurred between you and Ruppelius about that other group of men.

Mr. DOCKWEILER: The same general objection.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

Mr. Ruppelius came in the morning of the 8th of October and asked me what I was doing. I replied "I am working." He says to me: "Leave your work and go and look for people for me." He said he had lots to do; that I could make ten dollars a day, and that he would pay me ten dollars. I worked ten days and got him eighty men.

Q. What became of those men?

Mr. DOCKWEILER: The same general objection.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

I brought them to the station on the 11th. I put them on the train and was going to bring them to Nogales, Sonora. After 195 they were on the car I asked him for the tickets for the people. He said "Don't worry, I've got them." I then asked him for some money and he said that he would give me some when we got to Nogales. I said "Here is your people; take them; I don't want to go; I will remain working in my home."

Cross-examination:

I have known A. E. Burnett, the immigration inspector, for the last few days. He talked to me about this case. I don't remember when. It was at the Mexican Consul's at Hermosillo. That's where I met him the first time. Mr. Burnett did not talk to me in Tucson about the case. He talked to me in Hermosillo for about an hour. Mr. Morrison was present. Mr. Burnett came over with the picture and asked me if I recognized those pictures. My arrangements to come to Tucson were made with Mr. Morrison.

LUIS SANCHEZ called as a witness by the plaintiff testified:

My name is Luis Sanchez. In October, last year, I lived in Hermosillo. I know C. J. Ruppelius. I saw him in Hermosillo the latter part of October last year.

Q. What if any business transactions did you have with him at that time?

Mr. DOCKWEILER: We object to that question on the general ground heretofore urged to the—

The COURT: Overruled.

A. He spoke to me to get some people for him for the works of Grant Brothers, in Cochise. I got the people and know most of the people by sight that I got together.

Q. Well, what if anything did you say to these men about working for Grant Brothers in Arizona?

Mr. DOCKWEILER: The same general objection.

The COURT: Overruled.

A. I told them what he told me, that the prices would — commencing from seventy-five cents to two dollars and a quarter, gold.

I know Ramon Felix. I saw him on October 28th in Hermosillo at the little store of Jose Maria Lopez. I got forty-five men together. Ruppelius sent them on the train. I know Nicolas Casteneda. When we got the people on the car, Ruppelius went in and counted them, and he asked me if I had anyone to take charge of these people, that could be sent in charge of these people, and I recommended Mr. Casteneda. Ruppelius told these men to get together and get on the car, and they got on there, and Ruppelius counted

197 them and got their tickets. I don't know anything about the method by which the transportation for the car and people was paid, and in my presence nothing was said about tickets. Ruppelius attended to that. They brought that car this way on the regular train coming through there from Guaymas. With reference to the picture marked Plaintiff's Exhibit "3" I know the following men by sight or name who were in the party in that car: Number one, Rivera; I don't know the name of number three, sitting over there. I know number two, number thirty I don't know his name, he is a boy born and raised in Hermosillo. I know number one, two and three by name. I don't know number four five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one. I know twenty-four by sight; I don't know his name. He was down in Hermosillo in this party; forty-one I know by sight, I don't know his name.

Cross-examination:

In talking to the men at Hermosillo I told them that the work was directed in Cochise; that they were to get a dollar and seventy-five cents to two dollars and a quarter, gold. I spoke to every man whose picture appears in the photograph, I saw the photograph in Hermosillo once,—the first time. Mr. Morrison presented it to me. The Consul and Mr. Burnett were present. It was 198 around the 15th or 16th of May. Mr. Burnett talked to me about this case. He stated that I had to come as a witness in this court in respect to the people I got together. I have never been in America before, and now reside in Hermosillo.

FRANCISCO CORRALES called as a witness by the plaintiff testified:

My name is Francisco Corrales. I live in Mexico. I am born in and a citizen of Mexico, and have never been naturalized in the United States. I was in Hermosillo the latter part of October last year. I know Luis Sanchez.

Q. Did you have any conversation with him relative to going to work any where?

Mr. DOCKWEILER: The same general objection as urged before.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

A. Only when he hired me to work.

Q. Well what did he say then?

Mr. DOCKWEILER: The same general objection.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

- A. He told me if I wanted to put my name down as laborer to go to work there, close to Douglas, somewhere, on the grade.
- 199 He told me the wages offered was one dollar and seventy-five cents, gold. At that time I was earning in Hermosillo two and a half, silver. He told me the work was on that grade that they were building. He told me this at the station at Hermosillo. There were about ten other persons, laborers, present. I got into a car with as many as forty-five. I knew Ruppelius just by sight when he was there. That (indicating Mr. Ruppelius) is the man that I saw in the car when he counted the people. After he counted them they got off the train. I don't know how the transportation for myself and the people in that car was arranged. I didn't pay anything. We got on that car at Hermosillo and got as far as Lomas where we slept that night. From there they took us to Naco. At Lomas two gentlemen came in a carriage. I know one of them, Mr. Randall. These two men gave us supper. The next morning the engine came from Nogales and took us to Naco. I don't know who paid our transportation from Nogales to Naco. I didn't pay it. We got to Naco on the 29th in the afternoon. The next day they sent the rest of the men back, leaving six of us there. We were examined by the Board of Immigration at Naco. I was one of the six not sent back. Since the 29th of October, 1909, I think, we were fifty days at Naco and Tombstone and the rest of the time here in jail. I was a member of the group of persons of which a picture was taken at Naco, Arizona, by the Immigration office. With reference to the picture marked Plaintiff's Exhibit "3" I know the following:
- Eduardo Rivera is number one; Jose Valencia is number two; Abelardo Torres is number three; number four I don't know; number five, either; I don't know number six; number seven I don't know; number eight I don't know; number nine, Manuel Mejia; number ten I don't know; number eleven I don't know. Donicio Nunez, number twelve; number thirteen I don't know; number fourteen, Nicolas Casteneda; number fifteen I don't know; number sixteen, Andres Lopez; number seventeen I don't know; number eighteen I don't know; number nineteen is Gomocindo Portillo; number twenty is Manuel Tona; number twenty-one I don't know; number twenty-two, Jesus Guevarra. Those two in the middle are guards, their numbers are twenty-three—I don't know the other guard's number. Twenty-four is Pedro Zepeda; number twenty-five I don't know; number twenty-six I don't know; number twenty-seven I don't know; number twenty-eight I don't know; number twenty-nine I don't know; number thirty I don't know; number thirty-one, Manuel Escobosa; number thirty-two I don't know; number thirty-three, Francisco Corrales, that is myself. Thirty-four Simon Espinosa; number thirty-five I don't know; number thirty-six, Jose Maria Gonzales; number thirty-seven I don't know; number thirty-eight, Ricardo Lopez; number thirty-nine, Alberto Ruiz; number forty, I don't know; number forty-one,
- 201

Eulalio Zamora; number forty-two I don't know; number forty-three I don't know; number forty-four I don't know; number forty-five I don't know; number forty-six I don't know.

Q. What was your purpose in coming to the United States at that time?

Mr. DOCKWEILER: We object to that question upon the general grounds, and also on the ground that it asks for a conclusion of the witness.

The COURT: He may answer.

Mr. DOCKWEILER: Exception.

A. To work at that grade that they are building between Bisbee and Douglas.

I came to see if I couldn't earn a little more here. I was getting two and a half in Mexican money in Hermosillo, which I think is worth a dollar and a quarter in American money. All these men that I testified to that I know in this photograph were in that party of laborers that came from Hermosillo to Naco. In addition to those that I have testified to, there are others in this photograph that I know by sight. All of the men in the picture, except the two guards, came from Hermosillo in the car to Naco. The night that we were examined before the Board of Immigration at Naco, they took us from the Immigration Office to a restaurant.

202 Cross-examination:

I was in the United States in the latter part of 1904 and the early part of 1905 in Douglas working in the Copper Queen.

Q. How long did you work at the Copper Queen?

Mr. MORRISON: Objected to as being absolutely immaterial, Your Honor.

The COURT: What is the purpose of it? I will sustain the objection, unless there is some purpose that is not apparent.

Mr. DOCKWEILER: We believe he was entitled to come back, Your Honor, and the object of this examination is to show that he had been previously in the country, and had a right to return.

The COURT: The objection is sustained, if that is the purpose of it.

Mr. DOCKWEILER: Exception.

The COURT: Have you any authority on the point, that you are about to submit?

Mr. DOCKWEILER: No, to be entirely frank, Your Honor, I have not, at this time.

The COURT: The objection is sustained.

I remained in the United States a month and some days
203 and then went back to Sonora. I did not return to the United

States at any time subsequent and prior to this last visit. I saw this photograph first at Tombstone. Mr. Burnett of the Immigration Office showed it to me. I examined this picture about ten minutes before coming on the witness stand. At the time Mr. Burnett presented the photograph to me he asked me to tell the persons that I knew in that picture, which I did. He said nothing more.

I know Benito Acuna and Jose Acuna; I have known the latter for a long time; I first knew him when he was a little fellow; I have always resided in the same place with him in Hermosillo; I didn't see him for some time; he has been around the United States somewhere. I don't know what place.

Q. Is it not a fact that Jose Acuna has personally told you that he has resided in the United States in 1899 and also in 1909, and prior to October, 1909?

Mr. MORRISON: We object to it, as calling for hearsay testimony, immaterial and incompetent, and not tending to prove any issue in the case.

Mr. DOCKWEILER: I will also state, for the information of the Court, that Jose Acuna that I am now referring to, and whose name is embodied in my question, is one of the parties alleged to have been an alien, in the plaintiff's complaint in this case.

204 The COURT: I will sustain the objection.

Mr. DOCKWEILER: Exception.

I am acquainted with Donicio Nunez. I have known him at Hermosillo since he was a little fellow. I don't know whether or not he was ever away from Hermosillo.

Q. And do you mean to say that Donicio Nunez has lived at Hermosillo constantly ever since you got acquainted with him, as a little boy?

Mr. MORRISON: Now just a minute: We object, if Your Honor please, to this entire line, and particularly to this question, and generally to the entire line of the examination, as simply consuming the time of the court and being immaterial and irrelevant, and not tending to prove any issue in the case.

The COURT: I don't perceive the relevancy of it, but if counsel has any particular reason for it—

Mr. DOCKWEILER: Well, I think in fairness to the Court, I desire to state that I hope to be able to prove—I have never talked to this gentleman, but he said he was acquainted with this man Nunez ever since he was a little boy, indicating that he was an intimate friend of Nunez, and I purpose to show by this witness that Nunez was in the United States from 1904 to 1909.

205 The COURT: At the time of this alleged offense?

Mr. DOCKWEILER: Oh, prior.

The COURT: But you don't expect to show that he did not come up here, as testified to by this witness? If for that purpose, it might be proper. Do you expect to show that he was naturalized, or was a native-born citizen of the United States?

Mr. DOCKWEILER: No, I don't expect to show that he was a naturalized citizen of the United States, or born in the United States, but I do expect to show that this particular man lived in the United States for the period of practically five years, and that he had been engaged in labor here, and that notwithstanding the fact that he had returned to his mother country, he was entitled to come back.

The COURT: I don't understand that to be the rule of law, at all.

If you have any authorities that will bear you out, in this theory, I will be glad to consider them.

Mr. DOCKWEILER: I haven't any with me now, Your Honor.

The COURT: I will sustain the objection. I don't understand that to be the rule of law, at all.

Mr. DOCKWEILER: Exception.

206 The COURT: Besides, I understand that one of the grounds of the objection is that it is not proper cross-examination.

Mr. MORRISON: We will add that, if Your Honor please, to the objection.

Mr. DOCKWEILER: Well, Your Honor, he has testified that he knew these people. Now, having testified that he knew this particular man, and identified him, we have the right to test the character of his knowledge.

The COURT: If that is the purpose of it, you may proceed.

I have known Simon Espinosa six or seven years. I first met him working at the section house on the railroad at Hermosillo, six or seven years ago. He remained there at work for some time. I don't know whether Simon Espinosa ever went on a trip or visit. I think he continued to live at Hermosillo ever since I first met him most of the time. I have known Alberto Ruiz a very short time, at the most about a year. I don't know whether he was ever in the United States before October, 1909. I have known Eulalio Zamora only a very short time, about a year or six month-; most of the time that we have been held here.

207 RICARDO LOPEZ called as a witness by the plaintiff testified: My name is Ricardo Lopez. I live, and was in Hermosillo the latter part of October last year working in a brewery and earning two dollars, Mexican, worth one dollar in American money. I knew Luis Sanchez down there and had some business with him on the 28th of October last year.

Q. Well, what occurred between you and him?

Mr. DOCKWEILER: We object to that, making the same general objection as heretofore.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

I met him as I got to station. He was putting down the names of the people. I came to the station because I knew about their gathering up people from the rest of the party.

Q. Alright, and when you got to the station on the morning of the 28th what happened between you and Sanchez?

Mr. DOCKWEILER: The same general objection.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

A. I asked him which way the laborers were going, and he told me between Naco and Bisbee. That the wages were one dollar and seventy-five cents, gold. I know Ruppelius. That (indicating Mr.

208 Ruppelius) is the gentleman. I saw him in Hermosillo afterward. Sanchez told me I was going to work on the grade between Naco and Bisbee on the grade there, and I told him to take my name down. He told me to come at eleven o'clock to the station to go way on the train. I went to the station. When I got there, there were about ten others. They put us on the car. There were about forty-five men. At that time Ruppelius was with Luis Sanchez on the top of the car counting us. I didn't see any list. Luis Sanchez couldn't come with us and Ruppelius left one of our men, Nicholas Casteneda, in charge to bring us to Lomas. I know about the transportation; Ruppelius wanted to give the passes to Casteneda, and then after that he gave it to the conductor for forty-five men. I know this, because Ruppelius said he was going to give it to him. The conductor had the pass. It was a yellow paper about a foot long. I don't know whether it looked anything like that (showing the witness a paper.) At Lomas two gentlemen came in a carriage between seven and eight and brought us grub. One of them I know, Mr. Randall. Before he left he said that he would be there in the morning at seven o'clock to take us to Naco, which he did, and we got to Naco about half past three in the afternoon. The forty-five men that started from Hermosillo went into the United States in the coach. They took us into the Immigration Office and asked us a lot of questions. About ten o'clock they took us to supper.

209 On the 28th and 29th days of October last year I was a citizen of Hermosillo, Mexico, and had not been naturalized in the United States. I was a member of the party whose picture was taken at Naco on the 29th or 30th of October. Plaintiff's Exhibit "3" is that picture. With the exception of the two marked "23" and "25" all the rest in that picture came from Hermosillo in the coach, as I testified, on the 28th and 29th days of October to Naco and entered the United States at Naco.

Q. What was your purpose in coming to the United States at that time?

Mr. DOCKWEILER: The same general objection, and also that the question called for the conclusion of the witness.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

A. To work.

Cross-examination:

I know Eduardo L. Rivera very well, and have known him for the last six or seven years.

Q. Where has he been living for the last six or seven years, to your personal knowledge?

Mr. MORRISON: If Your Honor please, we object to this line, on the ground that it makes no difference how long he had known him or where he knew him.

210 Mr. DOCKWEILER: I want to show by this witness that this man Rivera was in the United States in 1908, and lived here.

The COURT: But had been back?

Mr. DOCKWEILER: That he had gone back, but that in 1908 when he was here he was a bona fide resident here—had not come here just temporarily.

The COURT: Objection sustained.

Mr. DOCKWEILER: Exception.

I have known Jose Acuna very well for the last ten years. I heard he came out to Arizona. I don't remember when he first came to Arizona. It was approximately two or three years ago. I don't know how long he remained in Arizona. I was not with him here, but heard in Hermosillo that he had come this way. I don't remember how long he stayed away. It was some time, but I had seen him in Hermosillo about a month before he took the train to come to Lomas in October. I don't remember how much of the last ten years he was away, and absent from Hermosillo, whether one month or a year, or two years, or any length of time, I don't know.

NICHOLAS CASTENEDA called as a witness by the plaintiff testified:

My name is Nicolas Casteneda. In the latter part of October, 1909, I lived in Hermosillo, working in the brewery, earning
211 two dollars in Mexican money, which is one dollar in American money. I saw Luis Sanchez and Ramon Felix down there about that time.

Q. What if any business transaction occurred between you and Luis Sanchez?

Mr. DOCKWEILER: The same general objection as heretofore interposed.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

A. I saw Luis Sanchez at the depot at Hermosillo. He was putting down the names of laborers. I asked him where he was taking them laborers to, and he told me that they were going to the United States to the grade that Grant Brothers were building at Bisbee. I asked him for the wages.

Q. Well, go ahead and tell us what the conversation was.

Mr. DOCKWEILER: The same general objection.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

A. There was lots of people there. There was no conversation, only I asked him how much the wages was.

He asked me if I wanted to come, and I told him yes,
212 and he took my name. He said the wages there were two dollars and a half and three dollars, and that the least that was paid was one dollar and seventy-five cents. He didn't tell me how much I was to get, only he told me what the wages were. I know Charley Ruppelius by sight. He is sitting back in the court room. I saw him on October 28th when he left Hermosillo on the morning that I was talking to Luis Sanchez. Ruppelius was around

Hermosillo. He was not present when I talked to Sanchez; on the 28th and 29th of October last year I was a Mexican citizen. After I talked with Sanchez and about the time we were going to leave, I spoke to Ruppelius.

Q. Well now state what that conversation was.

Mr. DOCKWEILER: The same general objection.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

A. He told me to do him the favor to look after the forty-five men, that they were coming from Hermosillo to Lomas.

The men were then in the car in Hermosillo. Sanchez counted them and there were about forty-five in the car. Ruppelius was on the steps of the car when they were counted. Ruppelius told me that the conductor had the passes. Ruppelius might have
213 paid the transportation, but I don't know. He only told me that he gave the passes to the conductor. They hitched us to the train and we came to Lomas where we stopped all night. Ruppelius told me that there would be two gentlemen to meet us at Lomas, so that we would get something to eat there, and two men met us at Lomas. Randall was one of them. Ruppelius did not say who the men would be that would come with the food. We were told to sleep at Lomas that night and Randall would come in the morning with more laborers from Nogales, and take us to Naco. Randall took us to Naco. I don't know how the transportation was paid. There were forty-five men all told in the car who were the same men that started from Hermosillo in the car, and who entered the United States at Naco, and were examined by the Immigration Bureau, and of whom a picture was taken the next day. Plaintiff's Exhibit "3" is a picture of the identical men who were in the car at Hermosillo and came to Naco, with the exception of two men marked on the picture "23" and "25." Of all these people I only know a few by name, but recognize all by sight.

Cross-examination:

I testified before the Immigration Board at Naco. The statements made to me at Hermosillo respecting work in the United States were made in the Spanish language. Luis Sanchez talked to me
214 at Hermosillo about working in America. All he said at any time was that there was work to be obtained in Arizona, and that the wages paid was from one dollar and seventy-five cents up.

Redirect examination:

I understood the question—that was all that was said. I testified on direct examination that Luis Sanchez told me that I would go to work on a grade for Grant Brothers and that is what was said.

Recross-examination:

I testified when examined before the Immigration Board at Naco that "I was promised work in Arizona, and came on that account."

That is all I testified to. When Sanchez talked to me he told me, on October 28th at Hermosillo, that the company of Grant Brothers were building a grade. Since the 29th of October, 1909, I have been in Naco and Tombstone, and the rest of the time here. Mr. Burnett first spoke to me at the Immigration house, and on the day I saw him here. Mr. Burnett asked me if I could recognize that man—Charley. That is all he has talked to me since I was examined at the Immigration Office at Naco.

215 Redirect examination:

I talked to Mr. Morrison about this case some day last month and also spoke to the interpreter. Mr. Morrison never showed me a picture.

A. E. BURNETT recalled as a witness by the plaintiff testified:
Naco, Arizona, is in the County of Cochise, Territory of Arizona.

JOSE ACUNA called as a witness by the plaintiff testified:

My name is Jose Acuna. I live in Hermosillo. On the 28th and 29th days of October last year I was a native born citizen of Mexico, and have never been naturalized in the United States. On October 28th and 29th last I knew Luis Sanchez, and saw him in Hermosillo.

Q. You may state what if any transaction occurred between you and him at that time.

Mr. DICKWEILER: We now enter the same general objection that we have made to the various questions propounded to the preceding witness on Saturday last.

The COURT: Overruled.

Mr. DICKWEILER: Exception.

A. He told me if I wanted to go to work to a grade at Naco, or Bisbee for Grant Brothers. I asked him how much the
216 wages were and he told me from one dollar and seventy-five cents up to three dollars, gold. He put my name down on the 27th and told me that the laborers would leave on the 28th. He took everybody's name down, so as to get a list of the laborers. On the 28th I waited in the station till about twelve o'clock when the train left. I knew and saw Charley Ruppelius at the station on the morning of the 28th. I had no conversation with him, nor with Luis Sanchez, at the station on the morning of the 28th, only Sanchez spoke to me about the work that there was at Naco, or Bisbee. The work was to drive teams, and generally to finish up a grade that they were building. At that time I was not doing anything in Hermosillo. I had worked outside of Hermosillo in the mining camps. I am a miner. There were other laborers around the station who got on the car before the train got there. I saw Ruppelius in the car. He was talking to Sanchez. When the train came from Guaymas to Hermosillo they put that car on the train. They left the car at Lomas. Nicolas Casteneda was in charge of that party from Her-

mosillo to Lomas. We got to Lomas at seven o'clock. About half an hour later two gentlemen came. I knew one of them, Charles Holler, whom I had known before that time. The other was Mr. Randall. They came in a carriage with some grub. The next morning Mr. Randall came over and took charge of the people to Naco. I saw the Immigration officer take the people off the car, including myself, into the Immigration Office. where they asked me a lot of questions.

Q. What was your purpose in coming to the United States?

Mr. DOCKWEILER: The same general objection, and as calling for a conclusion of the witness.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

A. I was coming to work driving a team and was to receive two dollars and twenty-five cents, gold.

After we were examined by the immigration officers at Naco, a picture was taken of the men who came in the car from Hermosillo. All the men shown in Plaintiff's Exhibit "3", with the exception of the two American guards, marked "23" and "25", were the men that came from Hermosillo to Naco in the car.

Cross-examination:

Q. How often have you been in the United States?

Objected to by the plaintiff as wholly immaterial and as not tending to prove or disprove any issue in the case.

218 The COURT: If it is for the purpose indicated a day or so ago by counsel, to establish the period as counsel then announced, that if he had been here before he might come back under any circumstances as I understood your contention, I will sustain the objection to it, as not being the law of the case, as I understand it at the present time. If it is merely to test his credibility, you may ask it for that purpose.

I have been in the United States about eight times. I came first in April, 1905, to Tucson, and stayed there one day and went to Silverbell, where I remained about six months; from there I went to Christmas, Arizona, where I stayed about seven months. At both places I was working all the time. From Christmas I went to Hermosillo. I remained in Hermosillo four days and returned to the United States. I first was at the little mining camps around Nogales. I then came here and from here went to California. The last five years I have been to different places. I can't state every place I have been.

Q. How much of the last five years have you spent in the United States.

Mr. MORRISON: We object to that as not proper cross-examination, and not tending to prove or disprove any issue in the case.

The COURT: Objection sustained.

Mr. DOCKWEILER: Exception.

219 **The COURT:** If it is for the purpose of testing the credibility of the witness you may ask it.

Mr. DOCKWEILER: I shall proceed upon the theory of testing the credibility of the witness.

Of the last five years I have spent over two in the United States. I first landed in the United States, April 17, 1905, and remained about thirteen months, then returned to Hermosillo on a four days' visit and after that remained in the United States off and on about four or five months. I did not state before the Immigration Bureau at Naco, on October 29, 1909, that I first came to the United States in 1899—I did not make that statement before the board. I did state to the Immigration Board that I had been in California and Arizona between the years 1899 and 1909. I now make the statement that I was in the United States for the first time only, beginning April 17, 1905, because there was no jury present, and I was claiming my rights to come into the United States. They asked me questions as an immigrant, not as a witness. I returned to Hermosillo for four days to see my mother after having been in the United States. After I saw her I returned to the United States. I went around to those little mining camps around Nogales, first, and then found work at Helvetia. At that time I preferred to live in the United States rather than in Mexico, but when I first came to the United States in 1905, I did not intend to remain here. I never made up
220 my mind to live permanently in the United States, but came here to work, six, seven, or eight months, and make money and go back to Mexico and spend it, and after I had spent it over there, come back over here to earn money and spend it in Mexico. Several times I spend my money before I got there, but most of the time I spend it over there.

ABELARDO TORRES called as a witness by the plaintiff testified:

My name is Abelardo Torres. On the 28th and 29th of October, last year, I was and am now a native born citizen of Mexico, and living in Hermosillo, and was never naturalized in the United States of America. On the 28th of October I left Hermosillo and came to Lomas the next morning. From there we went to Naco. There was four or five (45?) of us. A picture was taken of the party at Naco on the 29th and 30th of October. With the exception of the two guards, No. "23" and "25," the rest of the men in the picture, Plaintiff's Exhibit "3", I recognize all of them as being the same party which came from Hermosillo to Naco on that trip.

Q. State what if any conversation you had with Luis Sanchez touching your going to work any where on the 28th of October, 1909

Mr. DOCKWEILER: The same general objection.

221 **The COURT:** Overruled.

Mr. DOCKWEILER: Exception.

I was passing by the station with my wagon hauling wood when I heard a remark, made by Luis Sanchez, that there was work outside of Hermosillo. I got off and spoke to him and he wanted me to come to work over here. He told me the work was in Arizona. He took

my name down and told me I would have to go to work on the grade with the company of Grant Brothers. It was about eleven o'clock. He told us to get ready, that there was a car waiting for us, and that that man would come along. They counted us in the car and turned the list of the number of men over to Casteneda. There were forty-five and they all came to Naco. They had all put their names down as laborers to work here in Arizona, between Bisbee and Naco. I came with the intention to go to work. I was driving a cart around Hermosillo by contract.

GUMERCINDO PORTILLO called as a witness by the plaintiff testified:

My name is Gumercindo Portillo. On the 28th and 29th of October last I was, and now am, a native born citizen of Mexico, living in Hermosillo, working as a shoemaker and earning two and a half and three dollars a day, Mexican money. I know Luis Sanchez, and saw him at the station in Hermosillo on October 28th. On that day I was passing by the station and noticed that they were trying
222 to get laborers to come to the United States.

Q. Go ahead and tell the conversation you had with Luis Sanchez.

Mr. DOCKWEILER: The same general objection.

Mr. DOCKWEILER: Exception.

The COURT: Overruled.

He asked me if I wouldn't like to come and go to work. I asked him for the wages and he told me, and I put my name down to come to this work. He told me the wages would be one dollar and seventy-five to three dollars, gold. He offered me no regular wages. I told him I would see what I could do when I got to work. I know Charley Ruppelius. They told the people that were there in the shipement to get on the car before the train got there from Guaymas. They hitched that car to the train and took it in the direction to Naco. We remained asleep all night in Lomas, and next day went to Naco. There were forty-five in that car. I saw them all, and the car with the forty-five men entered Naco, Arizona. There was a picture taken of the forty-five men at Naco on the 30th of October. Plaintiff's Exhibit "3" with the exception of the figures marked "23" and "25" shows the picture of every man that started from Hermosillo with me in the car and went to Lomas and Naco.

223 GUSTAVO S. RANDALL called as a witness by the plaintiff testified:

My name is Gustavo S. Randall. I am a railway clerk. I know W. W. Carney and saw him in Nogales, Arizona, about October 28th, last year. Prior to the 28th I had been working for Grant Brothers as watchman in camp No. 5 at Douglas. I had quit three days before. Camp 5 was not the most southerly camp. There were five camps on all the roads. That is the camp farthest south. When I saw Mr. Carney in Nogales Mr. Holler was present. He told me he was going to send his men down here to Naco. The first time I saw Mr. Carney in Nogales was on October 28th. Mr. Holler was present. Mr. Holler introduced Mr. Carney to me and Mr. Carney

asked me if I could take people to Naco. I told him "yes." Mr. Carney told me to come on the train at seven o'clock in the morning to give me instructions, and he left. The next morning he told me that there was a car with people at Lomas and that the train I was going on was going to pick up that car, and for me to count them and turn them over to Mr. McDonald. That Mr. McDonald would wait for me at Naco. Mr. Carney put me in charge of nineteen men, which he put on the train at Nogales, Arizona, and the forty-five that were at Lomas. Mr. Carney gave me Plaintiff's Exhibit "10" and Plaintiff's Exhibit "2." This was for the nineteen men that got on the train. Though the pass says "for twenty-nine," twenty-
 224 nine did not get on. He gave me a pass for ten more men than got on at Nogales. I don't know why, but there were only nineteen men who started from Nogales. Of the nineteen, two came back from Naco, and seventeen Mr. Burnett permitted to go over the line. I don't know what happened after. All I know is that Mr. McDonald gave me a written receipt for the seventeen men; that is the receipt, I saw him write it. That was the first time I was with Mr. McDonald at Naco.

Paper offered in evidence by the plaintiff and objected to by the defendant as incompetent, irrelevant and immaterial, and no foundation laid therefor, and it not having been shown that D. R. McDonald or Gustavo S. Randall were authorized to bind the defendant. Objection overruled and exception by the defendant, and paper admitted and marked Plaintiff's Exhibit "16."

I didn't see the seventeen men any more after I got the receipt. I don't know what Mr. McDonald did with these men. I turned the men over to McDonald on the 29th. On the 28th of October, Holler and I went to Lomas. We took provisions with us and turned the provisions over to the men at Lomas. I understand Holler paid for the provisions,—I don't know.

Q. Now, at the time that these provisions were turned over to the men in the car at Lomas, what conversation occurred between
 225 Carley Holler and Casteneda and yourself.

Mr. DOCKWEILER: The same general objection.

The COURT: Overruled.

Mr. DOCKWEILER: Exception.

After Mr. Holler presented himself to Mr. Casteneda he told him that I was going to bring the people to Naco. The first time that I saw the nineteen men was when they started with me on the train from Nogales, Sonora, in Mexico. On the morning of the 28th of October, I saw the conductor of the Nogales-Del Rio train, and Mr. Carney converse with each other. I don't know who paid the transportation for the thirty-five men for whom I had no transportation. I had transportation for twenty-nine but transported some sixty-four men. There were thirty-five men transported part of the way, for whom I had no transportation from Mr. Carney. I don't know how the transportation was arranged for those thirty-five. The conductor only asked me how many there were. Before that I had seen

the conductor talking to Mr. Carney. Mr. Carney gave me two letters, but he changed his mind and said he was going to give it to an American coming with me. I did not examine the letters and would not recognize them. I don't know Luis Sanchez. They gave me five dollars in gold for expenses. My arrangement for compensation had been made with Mr. Carney in the morning, and he gave me the five dollars. I asked Mr. Carney and he told me that he would give me five dollars Mexican money and my expenses.

Cross-examination:

I received no instructions from Mr. Carney to place the men at the disposition of the United States Immigration Office at Naco.

Q. Did you, on October 29th, 1909, at Naco, Arizona, and at an examination there and then held by a board of special inquiry of the United States immigration office, there being present Alfred E. Burnett, M. H. Jones and George Lockwood, members of the special board of inquiry, testify as follows, in response to question put to you, the question being as follows: "What instructions did Mr. W. W. Carney give you with reference to these men?" and in reply to that question did you not at said time and place, and under oath, and in answer to said questions, make the following answer: "To put them at the disposition of this office?" referring to the United States immigration office at Naco, Arizona?

A. To put them at the disposition—? No. He told me to pass them.

Mr. DOCKWEILER: We move to strike out the answer, as not responsive to the question, and counsel now requests the Court to instruct the witness to answer the question "yes" or "no."

The COURT: The latter part of the answer may be stricken out. The motion is denied as to the first part, "As to the disposition—". The rest of the answer may be stricken out as not responsive.

Mr. DOCKWEILER: Now, Your Honor, I asked this witness if he made such and such an answer to such and such a question. Now the witness must reply by either "yes" or "no."

The COURT: The Court has ruled upon this, Mr. Dockweiler, and cannot rule any further.

Mr. DOCKWEILER: Exception.

Question repeated to the witness.

A. Not at the disposition of that office.

I was examined at the immigration board at Naco on October 29, 1909. I don't remember whether I was sworn before I was examined.

Q. At an examination of yourself before the board of special inquiry of the immigration bureau, sitting at Naco, Arizona, October 29th, 1909, while being interrogated before said board, were you not asked this question: "What instructions did Mr. W. W. Carney give you with reference to these men?" That is the men that you took over to Naco.

228 Mr. MORRISON: We object to that for the reason that it has already been put by counsel and the Court has already ruled on it and held that it has been answered properly.

The COURT: Isn't this the same matter you have propounded?

Mr. DOCKWEILER: Yes, but I was going to put the question and ask him if that was put, and then, separately, the answer, for fear that it might be urged that he didn't understand it.

The COURT: The objection is sustained.

Mr. DOCKWEILER: Exception.

W. W. CARNEY recalled for further cross-examination by the defendant testified:

I have with me the letter received from a Mr. Pearce giving instructions about shipping men from Nogales, to Naco. This is the letter I received from Mr. Pearce.

Letter marked Defendant's Exhibit "2" for Identification.

GUSTAVO S. RANDALL recalled as a witness by the plaintiff testified:

At the time the immigration officers were examining the men at Naco, I made a statement.

Thereupon the plaintiff rested its case, and the jury being excused the defendant made the following motion:

229 *Motion to Strike Out Certain Testimony.*

Mr. BAKER: The first motion I desire to present to the Court is to exclude the testimony—strike the testimony from the files and exclude the testimony from the jury, of W. W. Carney, C. F. Holler, C. J. Ruppelius, Luis Sanchez and Ramon Felix, so far as the same relates to the making of any offer or promises of employment of the defendant in Mexico, and so far as the same relates to the defendant of any act or acts in Mexico, wherein they or either of them pretended to act for the defendant, for the reason that the plaintiff has failed to establish the defendant's connection therewith, but that on the contrary the evidence on the part of the plaintiff itself shows that neither one of them had any power or authority whatever to make or offer any promises of employment in behalf of the defendant to any Mexican in Mexico or to deal with or have any transaction with any Mexican whatever in Mexico, in behalf of the defendant.

The motion being argued by counsel it was overruled by the Court, to which ruling of the Court the defendant excepted.

Motion to Instruct.

Mr. BAKER: We now move the Court to instruct the jury to return a verdict for the defendant, for the reason that the plaintiff in the case has failed by testimony to establish either one of the causes of action set out in the plaintiff's complaint.

Now that is a general motion. It goes to all of the counts, but I state to the Court that directly after the action upon that motion I intend to move for an instruction up the several of these causes of action, separately; but I thought I would make the general motion, and then a special motion as to certain counts.

The COURT: Well, I shall overrule the motion, unless you desire to be heard.

Mr. BAKER: Now the defendant moves the Court to instruct the jury to return a verdict for the defendant so far as count number one in the complaint is concerned, for the reason that the plaintiff's testimony fails to show that there was any offer or promise of employment of the party named in that count, Benito Acuna, or that there was any agreement, express or implied, with said Benito Acuna, made in Mexico, by any one representing the defendant.

Now I desire to repeat that motion as to the following counts, except changing the names of the parties mentioned in each one of the counts; the same motion to apply to count number three, in reference to the man named as Jose G. Ayres, (Orias); count number four, Susano Benitez; count number five, Daniel Cabezul; count number seven, Martin Coronado; count number nine, Jesus Cota; count number ten, Ramon Enriquez; count number eleven, Manuel Escobosa; count number twelve, as to the man Simon Espinosa; count number thirteen, to the man Teodoro Garcia; count number fourteen, as to the man Alberto Gomez; count number fifteen, as to the man Trinidad Gomez; count number sixteen, as to the man Juan Maria Gonzales; count number eighteen, as to the man Nicholas Hernandez; count number nineteen, as to the man Felipe Jimenez; count number twenty, as to the man Eustaquio Yeyva; count number twenty-four, as to Ricardo Lopez; count number twenty-five, as to Francisco Lusania; count number twenty-six, as to Mariano Marin; count number twenty-nine as to Leocadio Parra; count number thirty, as to Manuel Peralta; count number thirty-one as to — Peraza; count number thirty-three as to Calixto Ramos; count number thirty-five, as to Juan Rodriguez; count number thirty-six, as to Alberto Ruiz; count number thirty-seven, as to Francisco Salazar; count number forty, as to Manuel Valencia; count number forty-one, as to Augustin Valenzuela; count number forty-two, as to Antonio Vernal; and count number forty-three as to Francisco Vidal.

The motion is now intended to apply to each one of those counts, separately.

The COURT: These are the cases where there have been no depositions from the persons, and where they have not testified, are they?

Mr. BAKER: Yes sir.

Mr. MORRISON: We resist the motion, Your Honor.

The COURT: I think it may be denied.

Mr. BAKER: Exception.

Whereupon the jury being recalled, the defendant made its statement of the case to the jury.

Defendant's Statement of Case to the Jury.

Mr. BAKER: Gentlemen of the Jury, the defense in this action is very simple and very brief—not intricate at all. Some time in the latter part of August or the first of September, 1909—last year, Mr. Angus Cashion, one of the representatives of Grant Brothers Construction Company, entered into an arrangement with Mr. W. W. Carney, at the Montezuma Hotel in Nogales, Arizona, to the effect and substance that the company would pay to Mr. Carney the sum of one dollar per head for all laborers that Mr. Carney might procure and produce upon the works of the Grant Brothers Construction Company, at or near Courtland, Arizona, in the construction of a railroad, and that they would have to be gathered around Courtland, Arizona, or near Courtland, Arizona, in Cochise
233 County, Arizona; that the company was furthermore to pay twenty cents—not exceeding twenty cents and meals for those men that might be transported around that railroad to Courtland, while they were en route; that that was the arrangement and agreement between them—Mr. Cashion and Mr. Carney. Furthermore, we will show you, gentlemen, that at that time, and as part of that agreement and understanding between these parties, Mr. Carney was informed and told, and cautioned and restricted not to employ any men in Mexico; not to have anything to do at all with the engaging of men in Mexico; to have no agreement or arrangement, in any way, shape or form, with men in Mexico—under this arrangement and this contract. We will show you, gentlemen of the jury, that at that time, and perhaps since, and prior to that time, Mexican laborers were constantly flooding or coming into this point at Nogales, Arizona, in search of labor in the United States, and of course, as a matter of law, if they came in of their own accord, without interference or assistance or encouragement by any other party on the Mexican side, anybody has a perfect legal right to employ them and put them at work when they are upon the American side. That after that arrangement, we will show to you that when men were shipped, that Mr. James Cashion, the vice-president of the company and the general manager of the company, and prior to the 28th or 29th
234 of October, when it is shown that the forty-five Mexicans or more—forty-five at least—passed over into Naco with some seventeen or twenty-nine, whatever the number may be, from Nogales, to Naco—that prior to that time, Mr. James Cashion again instructed, upon inquiry to ascertain where the men prior to that had been employed; and he was informed that they were properly employed on the American side, and after they had passed through the immigration office of the country; and that he again instructed Mr. Carney not to have anything to do with anybody on the Mexican side; to make no employment there, and have no dealings with them at all, but to only take his laborers from the American side of the line. Now we will show you, gentlemen of the jury, that this company innocently, and in good faith gave those instructions, and in good faith relied upon those instructions being followed, and be-

lieved that they would be carried out, and that this company—this defendant, had no knowledge whatever, at all, that men were being taken from Mexico—if they were taken from Mexico—or that those instructions were violated in one single instance. We will show to you that so far as this defendant company is concerned, they never knew this man Ruppelius, or Holler, or this man Felix, or this man Luis Sanchez; that they never came in contact with them in any way, shape or form. We will show that the company was absolutely unaware of any of the facts that you have heard related here
235 upon the stand—that they knew nothing of the facts in any way, shape or form.

Now, with that statement, gentlemen of the jury, we will contend that when we prove that, the defendant is entitled to a verdict.

Whereupon the defendant introduced the following evidence.

Contract previously marked for identification as defendant's Exhibit "1" offered in evidence by the defendant.

Contract admitted and marked defendant's Exhibit "1" and read to the jury.

ANGUS CASHION, called as a witness by the defendant testified:

My name is Angus Cashion. For the last three years I have been practically all the time in Mexico. I am assistant general manager of the defendant Grant Brothers Construction Company. In the latter part of August and September, 1909, I had charge of the works of that company between Kelvin and Naco in the Territory of Arizona. The company at that time was building a railroad grade between Kelvin and Naco for the Arizona and Eastern Railroad. I know W. W. Carney; I saw him in the latter part of August or the first of September, 1909, in Nogales, Arizona. We were sitting in front of the Moctezuma Hotel in Nogales, Arizona. Mr. Pearce, bookkeeper and paymaster of Grant Brothers Construction Company, was around the hotel somewhere, and I
236 had a conversation with Mr. W. W. Carney. Mr. Carney came to me and wanted to know if he could not furnish Grant Brothers some laborers. He said he was anxious to make a few dollars. I told him I didn't know, at that time we had a labor agent in the field over at El Paso. Then I asked Mr. Carney, "How do you expect to get those laborers?" He said he expected to open offices one at Douglas, Arizona, one at Nogales, Arizona, and one at Naco, Arizona, for the purpose of hiring those laborers. Mr. Carney wanted to know what we would pay him, and I told him I hadn't figured out what the laborers were costing us at that time. Then I told him we could afford to pay him a dollar a head for those laborers, and their expenses en route, and I told him we would do that. By their expenses I meant for their meals, two meals, one at Benson and one at Kelvin. The price of the meals that we were to pay was fixed at twenty cents a meal. The road referred to that they were coming over was the old S. P., I guess they called it the old Burro line at one time, from Nogales, Arizona, to Benson, from there they went over the main line to Pearce, I think they changed

at Pearce and went down that spur to the end of the line to Kelvin, at that time. Their meals were to be paid for only on that route. I also stated to Mr. Carney at that time, "Under no conditions do you want to go into old Mexico and employ any labor; we don't want you to solicit or talk to a man on the Mexican side."

237 Those were my words to Mr. Carney, and that was about all I had to say to him. That was about the latter part of August or the first of September. I am not acquainted with C. F. Holler. I never had any transaction with him, never met him, never knew him until I met him here in Tucson the last two or three days. I do not know a man by the name of C. J. Ruppelius. I have never met Mr. Ruppelius until I came here to Tucson. I believe I saw him in Guaymas around the ticket office at one time, but I never knew him. At no time did I have any conversation or arrangement with him about securing laborers for Grant Brothers Construction Company, I didn't know him. I absolutely knew nothing, nor did I ever learn, of any acts or speeches of either Mr. Carney, Mr. Holler or Mr. Ruppelius with Mexicans in Mexico, about working or coming to the United States to work for Grant Brothers Construction Company. I had no knowledge of any such transaction at any time, because my instructions to Mr. Carney was for him not to go into Mexico and have nothing to say to any Mexicans on the Mexican side.

Q. I understand you to say your instructions were, to Mr. Carney, not to go upon the Mexican side or have anything to do with any Mexican, or solicit their work over on the Mexican side at all.

A. Yes sir, I positively instructed Mr. Carney in those words, to have nothing to do with the Mexicans on the Mexican side, and not to go upon the Mexican side.

I do not know Luis Sanchez, Gustavo S. Randall, or Ramon Felix, I don't know either of them and never saw them to my knowledge.

Q. Did you ever have any conversation or have any knowledge of any act, speeches or conduct of either one of these men, with any Mexicans in Mexico, about going to the Grant Brothers' works in Arizona and going to work.

A. No, sir, I did not.

Q. No knowledge whatever?

A. No knowledge whatever.

Cross-examination:

I never knew C. F. Holler until I saw him in Tucson. I am not very well acquainted in Nogales. I have been practically living down in Mexico for the last three years. I am fairly familiar with labor conditions in Mexico. I, and the company, have handled a great many men in Mexico. I knew Mr. Carney's office was in Nogales, Sonora. Mr. Carney said that he was going to open offices in Nogales, Arizona, Naco and Douglas and El Paso. These three towns I mentioned are along the border between Arizona and Texas and Mexico; but Mr. Carney was not going to El Paso, we had another man there. We had a labor agent at El Paso, and Carney

239 was not to open an office there, only at Naco, Douglas and Nogales; these towns are on the border line between Arizona

and Sonora. I don't know, but approximately Nogales has probably ten thousand inhabitants. I expected at that time to get laborers who were in Nogales, that was the contract I made. I did not desire that Mr. Carney open offices along the line between Nogales and Sonora, he said he would do that, he said that was the way he was going to handle the labor and I said that was all right.

Redirect examination:

I know that there are at all times crowds of Mexicans coming across at those places and seeking employment.

The Court: Do you know that of your own knowledge, Mr. Cashion?

A. Yes sir—well, to my own knowledge, I have heard of the fact and I have seen it too, at Nogales, there is men crossing there all the time. But at Naco, Arizona, there is men coming in continually from that point, when we were in close there.

Q. How about Nogales?

A. Well Nogales is the same.

Q. Nogales is known as one of the best labor markets in the Territory is it not?

240 A. Yes sir, that is what Mr. Carney said to us, Nogales, Arizona, is supposed to be a good labor market.

Recross-examination:

Known to be a good labor market, that is what Mr. Carney said. I know that there are Mexicans coming across there all the time. I have ben in Nogales four or five times the last three years. I don't know of my own personal knowledge that there are Mexicans coming across all the time. When we were building that grade at Naco, Arizona, from fifteen to twenty men came in to the camp every day looking for work. I don't know where they came from, but they came from the direction of Naco. I do not know whether they came across the line or not, they were looking for labor, that is all. I was living in Mexico at that time.

JAMES CASHION, called as a witness by the defendant, testified:

My name is J. A. Cashion. In the year 1909 I was vice president and general manager of Grant Brothers Construction Company. In 1909 Grant Brothers Construction — were engaged in two different jobs in Arizona. One was building a railroad from Kelvin towards Naco, and the other one, building a railroad up the Gila River canyon. I can only get from our books the number of men employed, but approximately we employed in July, August and September, and a part of October, about eight or nine hundred men on the line between Kelvin and Naco, and about three to five hundred up the Gila River canyon. I am acquainted with W. W. Carney; I saw him some time in October, 1909, in front of the Moctezuma Hotel in Nogales, Arizona, Mr. J. A. Burton and Mr. McLean were present, I think McLean's initials are E. J. At that time I had a conversation with Mr. Carney relating to the hiring of Mexi-

can laborers to work on the road in Arizona. This conversation was in the evening of the 25th of October. I gave Mr. Carney instructions at that time. My first knowledge of Mr. Carney furnishing us laborers at all was that particular evening. Mr. Carney said, "I am sending a good many men to your work at Kelton." When he made that statement, I immediately asked him where he was getting those men. He says, "Here in Nogales." I says, "Do you mean on the American side?" He says, "Certainly." "Now," I says to him, "you want to be sure that you get them on the American side." I says, "We don't want you to get a man on the Mexican side; we don't want you to offer him any inducements of any description and I further instruct you not to even talk to a man regarding labor on the Mexican side." My instructions were positive. The first time I met Mr. Holler was last Thursday or Friday at the hotel here. I never had any contract or arrangement with Mr. Holler to approach Mexicans in Mexico, or have anything to do with them on behalf of Grant Brothers Construction Company, and never had any knowledge that he had been talking to Mexicans in Mexico about working for Grant Brothers Construction Company. The first time I ever met C. J. Ruppelius was last Thursday or Friday here at the hotel. I never spoke to him in my life until last Thursday. I did not know that he had ever spoken to any Mexican in Mexico about working for Grant Brothers Construction Company. I am not acquainted with Luis Sanchez, Ramon Felix or Gustavo S. Randall; I never had anything to do with either one of these men or speak to them about getting Mexicans in Mexico, and had no knowledge that they were doing anything about Mexicans in Mexico for Grant Brothers Construction Company. The first time that I ever heard about these men talking to Mexicans in Mexico was here during this trial. I had no knowledge of any dealing Mr. Carney may have had with Mexicans in Mexico on behalf of Grant Brothers Construction Company. The company has never furnished him with any passes over any road in Mexico for any purpose. Grant Brothers Construction Company has no passes, and did not have in 1909, over any railroads in Mexico that they can use. The company never authorized any passes to be issued or given to Carney over any railroad in Mexico coming from Nogales to Naco or from Hermosillo to Naco or Nogales.

Cross-examination:

My company never brought any Mexicans from Mexico into the United States with promises of work in the United States; I am quite sure of that. I did not state on or about the tenth of November last year that I had brought the same gang of Mexicans which we had down in Mexico, up, and were working them on this particular grade out here. I don't know Mr. Holler or Mr. Ruppelius. I am fairly well acquainted in Nogales, I have been there many times traveling back and forth. I don't know most of the Americans there, I know but few people there, only a certain set around the hotel and the railroad men. I know nothing about the labor agents around there, I had nothing to do with them, but we managed to have men work-

ing on our grades in Arizona. The men came from different directions. About ninety-five per cent of the common laborers were Mexicans, they came from different directions. What directions they mostly came from depended upon the season of the year. According to what Mr. Carney said, I think, that in the fall of 1909 five hundred common laborers could have been taken out of Nogales, Arizona and shipped to our camp; He said that from forty to fifty men
244 asked him for employment every day. If Mr. Carney says that they asked him on the Mexican side, his instructions were different, he said to me that they applied to him on the American side.

Redirect examination:

I had absolutely no knowledge that there were forty-five men, Mexicans, in a car going from Hermosillo up to Naco, Arizona, on the 28th or 29th of October, 1909.

Recross-examination:

The transportation through Arizona of the men whom Carney delivered to our camps from Nogales, Arizona, prior to this 28th or 29th of October was paid by the Southern Pacific Railroad Company. we were not charged with that, it was part of the contract introduced here in evidence that we had to build that railroad.

[Questions by the Court:]

Q. What was the occasion of your caution to Mr. Carney on the 25th of October?

A. Because I knew the consequences.

Q. Had you reason to believe that he was doing it?

A. No sir, I had no reason to believe, but to make sure that he would not, I gave him those instructions.

245 JOHN A. BURTON, called as a witness by the defendant, testified:

My name is John A. Burton. I reside at Los Angeles. I am now, and have been since its incorporation in 1903, the secretary of Grant Brothers Construction Company. I have with me the original minute book of the company. Its officers in 1909 were: President, John R. Grant; vice president, James A. Cashion; John A. Burton, secretary; and R. R. Rogers, treasurer. In addition to being vice president James Cashion was general manager. We also have an assistant secretary. These were the officers on October 27th, 28, and 29th, 1909. I am the John A. Burton referred to as secretary. Rogers, the cashier, never was in the Territory of Arizona in 1909, he has never been outside the state of California since the company was incorporated. As cashier he pays out the money of the company and keeps its books in Los Angeles. During the year 1909 the members of the board of directors of the company were: John R. Grant, James A. Cashion, J. A. Burton, I. B. Dockweiler, and D. B.

Grant. James A. Cashion had general charge of the works of the company in Arizona. I had nothing to do with the field work, I look after the books and the auditing department. I was present at a conversation between James A. Cashion and W. W. Carney, at Nogales, Arizona, in October, 1909, Mr. J. E. McLean was also present. In that conversation Mr. Carney told Cashion that 246 he was sending men over to Courtland to work, and Cashion said to him, "Where are you getting these men?" He says, "At Nogales." "Nogales, Arizona?" Cashion said. He said, "Yes," and Cashion then said to him, "I want you to get them at Nogales, Arizona, and not across the line, and don't talk to a Mexican on the Mexican side of the line." I said further to Carney that I didn't think that these men were worth a thousand dollars apiece to us, and he must be careful about that. At the request of Mr. Cashion I had come from Los Angeles to meet him at Nogales to figure on a contract with the Southern Pacific Company, that was the occasion of our being there. I arrived at Nogales on the 23rd, and Mr. Cashion on the 24th of October, 1909. I have been present every day of the trial of this case. I remember the witness C. F. Holler, I first met him in Nogales in November, 1909. Prior to November, 1909, I did not know that there was such a man. I had heard about this case, Grant Brothers name was connected with it, I went down there to see about it, and was down there looking it up. There had been some publication of the matter. I never at any time authorized Mr. Holler to go into Mexico or to speak to any Mexicans or laborers in Mexico. I did not have any conversations with him respecting the securing of laborers of any kind at any time. I saw C. J. Ruppelius at the hotel here, since this trial began, for the first time in my life. I never had any agreement or talk with him 247 respecting the securing of laborers of any kind at any time. The first time I saw Gustavo S. Randall was then he was brought into the court room here, I am not acquainted with Ramon Felix, and never met Luis Sanchez. I never spoke to Gustavo S. Randall, Ramon Felix, or Luis Sanchez respecting the securing of laborers. I was not informed of the transportation of forty-five or any number of laborers from Hermosillo to Naco, I first saw it in a Los Angeles paper, about four or five days after the 29th. I noticed it because Grant Brothers name was connected with it. That is the first I heard of this whole matter.

Cross-examination:

Mr. Angus Cashion didn't have the title on the books, but he was recognized as the assistant general manager on the works. In that conversation between James Cashion and W. W. Carney I made that remark about a thousand dollars a head. I remarked to Mr. Carney that he must be very careful, because these men were not worth a thousand dollars a piece to us. I and the company knew very well that if he violated that law we would be responsible in the sum of a thousand dollars a head. The employing of men was not in the line of my duty, if I had spoken about employing men it would have been without authority from the company.

JOHN R. GRANT, called as a witness by the defendant, testified:

248 My name is John R. Grant, I reside at Los Angeles, California, where I have resided for the last twenty years. I am now, and have been for the last five years, president of the defendant company, and was president in October of last year. Prior to the filing of this suit I knew nothing about any arrangement having been made with W. W. Carney about furnishing labor. I don't know at all Luis Sanchez, Ramon Felix, Gustavo S. Randall, C. F. Holler, or C. J. Ruppelius. Prior to October 30th, 1909, I knew nothing about any forty-five laborers brought up from Hermosillo to Naco to work upon the grade that we were building near Kelton, the first I seen of it was in the paper. As president of the company I have no immediate supervision of the work in the field, that is entirely in the hands of James A. Cashion and his brother.

Cross-examination:

The arrangement with Carney was not taken up in the office. I didn't bother about that, that was attended to down here. I didn't hear about it, I didn't know anything about it. I heard Mr. Cashion's testimony and believe he told the truth but I didn't know anything about it, and it is not likely that I would. Those things never bother me at all. They never bother us. That is handled in Los Angeles even, we hand it over to the agent and he gets the employment.

249 J. E. McLEAN, called as a witness by the defendant, testified:

For the last two or three years I have been assistant superintendent of the Sonora Railway and S. P. of Mexico. In 1909, I was living in Nogales, Arizona. I am acquainted with James Cashion, W. W. Carney and Mr. Burton. On October 25th, 1909, I saw these gentlemen at Nogales, Arizona. On that day I was present at and heard a conversation between Mr. Cashion and Mr. Carney. Mr. Carney, Mr. Burton, Mr. Cashion and myself were standing in front of the Moctezuma Hotel in Nogales, Arizona. Mr. Carney told Mr. Jim Cashion that he was sending men to work upon the grade on the line from Courtland to Naco. Mr. Cashion asked him where he was getting those men. He says: "I am getting them here in Nogales." Mr. Cashion said: "On the American side?" and Carney replied: "Yes." Mr. Cashion said "Well, now you 'be sure to get them on the American side. Under no circumstances offer them any inducement to come across the line, or even go across the line and talk to them." I lived in Nogales from April 1909, to April 1910. In a general way I am acquainted with the condition of the labor market at Nogales, Arizona, with reference to Mexicans coming across the line and seeking employment in the United States. In October 1909 there were several Mexicans there at all times seeking employment.

250 Cross-examination:

I am not employed at the present time, but at the time of this conversation I was working for the Southern Pacific of Mexico. In stating the conversation that occurred, I simply replied to the questions asked me—what if any conversation I heard Mr. Cashion have. That was my understanding of the question. The only other remark I remember along those lines was made by Mr. Burton. He turned around to Mr. Carney and said "You must be careful; these men are not worth a thousand dollars a head to us." I did not state this on my direct examination, because I was asked to tell what Jim Cashion said. I did not come here to testify to what James Cashion said, but to answer questions put to me. I answered the question by saying what Jim Cashion said, because that was my understanding of the way the question was put, and limited my answer to what Jim Cashion said, otherwise I would have expected it to be struck out as not responsive.

CHARLES E. PEARCE, called as a witness by the defendant, testified:

My name is Charles E. Pearce. I reside at Los Angeles. I am a bookkeeper and paymaster, and held that position in October, 1909, for Grant Brothers Construction Company, at that time in the Territory of Arizona, in connection with the building of a lien
251 between Kelton and Naco, Arizona, for the Arizona and Colorado Railroad. I was present and heard a conversation between Mr. Angus A. Cashion and W. W. Carney, which occurred at the Mactezuma Hotel, Nogales, Arizona, I should say in the very last days of August of last year. Mr. Carney approached Mr. Cashion with a proposition to furnish Grant Brothers Construction Company with some labor on the road about to be constructed from Courtland, in Arizona; I think, he expressed it, "I would like to make a dollar, if I could, out of this"—to Mr. Cashion; and Mr. Cashion said, "Why, how can you furnish us any labor—where do you expect to get it?" and he said, "Right here in Nogales; there is a good deal of labor here to be had at all times." And then he talked about the compensation. Mr. Carney said that he would be willing to furnish labor at one dollar per head, delivered on the work, and Mr. Cashion also to pay what expenses there might be incurred in feeding the men, and Mr. Cashion said, "How do you expect to obtain this labor and handle it?" He said, "I expect to open an office here in Nogales, Arizona, and ship the men up to you." Mr. Cashion considered it a while, and he said, "I think the compensation is very reasonable, but I want it distinctly understood that you confine yourself and your efforts entirely to the Arizona side—Nogales, here." Mr. Carney said, "There is a good deal of help here, and I can pick up enough right here to make it a good object to me to ship the
men up there."

252 I was bookkeeper and paymaster in connection with that Kelton work from the commencement up to about the completion. My duties as bookkeeper and paymaster, particularly with

reference to the men, is keeping track of the men. I kept the books and paid off the men. On that work, up to the first of November, there had been employed approximately five thousand men. Not to exceed ten per cent of these came from Nogales, Arizona. The other came from El Paso, Douglas, Tucson, Phoenix, Bisbee and from outside—I don't know where. I wrote the letter, marked Defendant's Exhibit "2" for Identification, on October 23rd. I received no reply to that letter from Mr. Carney or anybody else.

(Letter introduced in evidence by the defendant and admitted and marked Defendant's Exhibit "2" and read to the jury.)

No one directed me to send that letter. I was acting on my own motion and sent it for the reason that I state in the letter.

Cross-examination:

No laborers were sent as the result of those instructions that I know of, but I don't know. I am the bookkeeper and attend to paying off the men. I did not pay W. W. Carney for seventeen of those men sent under those instructions. I do not know whether or not he was paid by the company. I know D. R. McDonald, I
253 did not write him and tell him to go to Naco and receive those men. I have not the slightest idea how McDonald came to appear at Naco, at the moment that train came there. I never was an officer of Grant Brothers Construction Company, only an employee. On that letter the letters, "Grant Brothers Construction Company" were printed in red with a stamp, which was in my custody. Whenever in my duties I had to sign Grant Brothers Construction Company's name I used that stamp. It was always recognized. At the time of the original conversation between Mr. Angus Cashion and Mr. Carney I was in the employ of Grant Brothers. I heard Mr. Angus Cashion's testimony. I don't know that I testified more fully as to what was said than Mr. Cashion did. I remember that conversation very distinctly. Mr. Cashion said words to the effect "You are not to make any offer to anybody in Mexico." That is the best of my recollection as to my testimony. I testified from my recollection as to that conversation. I made no notes of it and am now able to come here and state the words of the conversation.

Questions by the COURT:

Q. Was it, or was it not part of your duty, Mr. Pearce, to look after the laborers and supply of labor out there?

A. None whatever.

254 Q. Well how did you come to write this letter then?

A. Well, in my position as bookkeeper, the correspondence back and forth came to me, and Mr. Carney would write that he had so many men to ship, or I, at the solicitation of the superintendent, would write to order the men.

Q. Who was the superintendent out there?

A. Mr. Taylor.

Q. Did Mr. Taylor direct you to write this letter?

A. He didn't direct me to write that—no. I wrote that letter for the reason that I gave in the letter; I thought it was a good idea—entirely my own initiative. It occurred to me it would be a good scheme, and I submitted it to Mr. Carney, as Mr. Carney was shipping men to us.

In response to questions by Mr. Morrison witness further testified:

The little word in defendant's Exhibit "2" is "W-e," we. I signed that letter "Grant Brothers Construction Company" by me. I meant we people that were doing the work. I represented it as Grant Brothers and stuck the stamp on there.

W. T. TAYLOR, called as a witness by the defendant, testified:

255 My name is W. T. Taylor. In August, September and October, 1909, I was general foreman of the camps on the Courtland line, Kelton to Naco, the work spoken of in this case. I have been present all the time during this trial. I know D. R. McDonald.

Q. In what capacity, if any, did D. R. McDonald act, either for the defendant company, or under you, or in connection with that work, in October, 1909?

A. Well, I used him as a roustabout, to run errands and different things.

On the 29th of October, 1909, with reference to the work at Naco, I was at the east end of Crook's tunnel, which is on the El Paso and Southwestern railroad. We crossed that road. I was in that camp. On that day I sent D. R. McDonald to Naco with instructions to load a stove and from there to go to Bisbee with Mr. Abrahams in a buggy. The stove was in a warehouse we had bought from Norman Cook. From Naco he was to go to Bisbee with Mr. Abrahams who runs a hotel at Naco, and to see what carts and harness there was for sale. I had heard that there was some for sale there. We were having some heavy blasts and I couldn't go myself. I received no information from W. W. Carney or anybody else, and had no knowledge that forty-five laborers or seventeen laborers, or any laborers

256 were going to be in Naco on October 27th, 28, 29th or 30th, 1909. I did not know at any time Luis Sanchez, Ramon Felix, Gustavo S. Randall, C. F. Holler or C. J. Ruppelius. I had seen Ruppelius once in the S. P. depot at Nogales, probably eight or nine months ago when I bought a ticket there. He then was the agent at Nogales. I only saw him in the ticket office, but I didn't know his name. In October, 1909, I was general foreman of this entire work acting under Mr. Cashion and receiving orders direct from him. Prior to October 29th I had not heard from or been communicated with by W. W. Carney with respect to the transmission by him or under him of any laborers to Naco for our camp, and had not received any word or communication whatever from Luis Sanchez, Ramon Felix, Gustavo S. Randall, C. J. Ruppelius, or either of them, and had no knowledge whatever that any

number of laborers had been secured anywhere in Mexico for the work of the defendant company in Arizona.

Q. During the entire time that you were on that work, do you know, or were you told of any instance where laborers had been secured for you in the Republic of Mexico, in any manner what soever?

A. No sir.

The camp foreman employed and discharged the laborers over which I had control. I was in immediate charge of the entire work under Mr. Cashion as general superintendent. Below
257 me each camp foreman had charge of his camp. There were five camps. The camp foreman and myself could discharge or employ men. The sub-foreman could discharge the men from the gang that he was in charge of. Mr. D. R. McDonald was not a sub-foreman or camp foreman and occupied no position by virtue of which he could employ or discharge men.

Cross-examination:

Mr. McDonald is here in Tucson. Mandershite I think was the name of our camp foreman. There are various sub-foremen. I couldn't possibly tell their names. Prior to the 29th of October I had sent McDonald to Naco, probably once or twice. I was superintendent of that whole grade and was thirty days on that work. I sent D. R. McDonald down there to load a stove.

Q. Now what did he do down there besides loading a stove?

A. Well, sir, the day I sent him in there, he was a very old man, and I gave him written instructions where to go and what to pick up here and there.

I do not know what he did down there besides loading the stove, I was not there. I don't know whether he came back to camp with
seventeen Mexicans. It was none of my business how they got their laborers, as long as they were employed according to
258 the work that was laid out by me. If there was such a transaction I don't know anything about it.

A. E. BURNETT, recalled as a witness by the defendant, testified:

I was a member of the board of inquiry held at Naco, October 29, 1909. I was present in the court room during this trial when Gustavo S. Randall testified. Gustavo S. Randall was examined by the board of inquiry and before being examined was sworn. The record of that board of inquiry shows that Gustavo S. Randall was asked, "Question—What instructions did W. W. Carney give you with reference to those men" and that he made the reply, "To put them at the disposition of this office."

Cross-examination:

The record also shows that he was asked, "To whom, if any one, were you instructed by Mr. Carney to deliver these people?" and that he replied, "To a Mr. McDonald who was the labor agent for Grant Brothers Construction Company."

D. R. McDONALD, called as a witness by the defendant, testified:
 My name is D. R. McDonald. I think that on the 29th day of
 October last I was at Naco, or right in the camp within twelve
 259 miles of Naco—Camp Four. I know Mr. Taylor the fore-
 man of the Grant Brothers' works there. On the morning
 of the 29th of October, 1909, he told me to go to Naco and get a
 range out of Norman Cook's warehouse and ship it to one of the
 camps, and also to go to Abraham's and get a team and go to Bisbee
 to look over the carts and harness. Under these instructions I
 went to Naco. I had no knowledge at all and did not know that
 any Mexicans were coming from Lomas, or Hermosillo, Mexico
 to Naco.

Cross-examination:

On that day when I was in Naco, I received a letter. It was in
 an envelope. I guess Plaintiff's Exhibit "9" is the envelope. Plain-
 tiff's Exhibit "8" is the letter. I gave a receipt for the seventeen
 men to one of the men that came with them. Plaintiff's Exhibit
 "16" is in my handwriting. I gave a receipt for seventeen men,—
 He turned over seventeen to me. I don't know how Mr. Carne-
 knew that I would be at Naco on that very day. I don't remember
 a man by the name of Crockett at Naco. I had been at Naco twice
 before.

Thereupon the defendant and plaintiff rested their case, and the
 plaintiff and defendant having argued the case to the jury, the
 Court gave the following instructions:

260

Instructions to the Jury.

The COURT: Gentlemen of the jury, this action is brought by the
 United States against the defendant, Grant Brothers Construction
 Company, to recover penalties claimed to have been incurred by the
 defendant by reason of the violation of the statute of the United
 States. The laws of the United States prohibit the coming into the
 United States of alien laborers who have been induced or solicited
 to immigrate to this country by offers or promises of employment,
 or in consequence of agreements, oral, written or printed, express
 or implied, to perform labor in this country of any kind, skilled or
 unskilled, or of any such aliens whose ticket or passage is paid for
 with the money of another, or who is assisted by others to come.
 It is provided, however, that the statute shall not be held to include
 professional actors, artists, lecturers, singers, ministers of any relig-
 ious denomination, professors for colleges or seminaries, persons be-
 longing to any recognized learned profession, or persons employed
 strictly as personal or domestic servants. It is also provided that
 skilled labor may be imported if labor of like kind, unemployed,
 cannot be found in this country. The law makes it an offense for
 any persons, company or corporation in any manner whatsoever to
 prepay the transportation or immigration of any contract laborer

261 or contract laborers into the United States, unless such contract laborer or contract laborers are of one of the classes which I have just indicated, and provides that any person, partnership, company or corporation violating the law by knowingly assisting, encouraging or soliciting the immigration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States.

The complaint in this action contains forty-five separate counts. In the first count of the complaint it is alleged that the defendant, the Grant Brothers Construction Company, on the 29th day of October, 1909, induced and solicited and caused to be induced and solicited one Benito Acuna, he being then an alien and a resident of and being in the State of Sonora, in the United States of Mexico, to immigrate from said United States of Mexico to the United States of America, by offers and promises of employment as a laborer in and toward the construction of a certain railroad then under the charge and management of the said Grant Brothers Construction Company, as contractor for the construction of said railroad in the county of Cochise, Territory of Arizona, United States of America, and that said Benito Acuna, upon said offers and promises of employment as aforesaid, emigrated from the United States of Mexico

262 to the United States of America, entering the United States of America at Naco, Cochise County, in said Territory of Arizona, on the 29th day of October, 1909, and that the said defendant, Grant Brothers Construction Company, assisted and encouraged and caused to be assisted and encouraged the importation and immigration of the said Benito Acuna into the United States, and furnished conveyance and transportation to the said Benito Acuna and paid and caused to be paid the expenses of his said trip from Hermosillo, state of Sonora, in the United States of Mexico, to Naco, Cochise County, Territory of Arizona, in the United States of America, and that said Benito Acuna, at all the times mentioned, was and now is an unskilled laborer, and not of one of the classes of persons exempted under the terms of the statute. Judgement is prayed against the defendant for the sum of one thousand dollars.

Each of the remaining forty-four counts of the complaint makes the same charge against the defendant, except that a different person named appears in each of the counts as the alien to whom the offers and promises are alleged to have been made, and who, it is claimed, was assisted and encouraged and caused to be assisted and encouraged in immigration to the United States, and to whom it is claimed conveyance and transportation was caused to be furnished, and whose expenses it is claimed were paid and caused to be paid by the defendant.

263 I instruct you that if you are satisfied from the evidence that at the time alleged in the complaint one Benito Acuna was an alien and a resident of and being in the state of Sonora, in the United States of Mexico, and was by the defendant knowingly induced or solicited or caused to be induced or solicited

to migrate from the United States of Mexico to the United States of America by offers or promises of employment as a laborer in or toward the construction of a certain railroad then under the charge and management of the said defendant as contractor for the construction of said railroad in the County of Cochise, Territory of Arizona, and that said Benito Acuna, upon said offers or promises of employment as aforesaid, migrated from the United States of Mexico to the United States of America, entering the United States of America at Naco, Cochise County, Arizona, on the 29th day of October, 1909, or that the said defendant Grant Brothers Construction Company knowingly assisted or encouraged or knowingly caused to be assisted or encouraged the importation and immigration of the said Benito Acuna into the United States or knowingly furnished conveyance or transportation, or knowingly caused to be furnished conveyance or transportation to the said Benito Acuna, or knowingly paid or knowingly caused to be paid the expenses or any part thereof of the said Benito Acuna in traveling from Hermosillo, state of Sonora, in the United States of Mexico, into Naco, Cochise County, Territory of Arizona, in the United States of America, and that the said Benito Acuna at that time was an unskilled laborer, and not one of the classes of persons exempted by law from the application of the statute to which I have called your attention, then you should find for the Government and against the defendant, upon the first count of the complaint, for the sum of one thousand dollars.

This instruction also applies to each of the remaining counts of the complaint, with the substitution for the name of Benito Acuna the name of the alleged alien mentioned in each of said counts respectively.

The Government is entitled to recover, if at all, only upon such counts of the complaint the allegations of which you find from the evidence have been proven, and if you fail to find from the evidence that the plaintiff has established the allegations of any count or counts, then as to such count or counts you must find the issues for the defendant.

You are instructed that the burden of proof in this case is upon the plaintiff; that is, upon the Government. The plaintiff must establish and prove the allegations of its complaint. It is not necessary for the defendant to disprove the acts with which it is charged. It is presumed to be innocent, and it is incumbent upon the plaintiff to prove the commission of the acts with which the defendant is charged. Unless you are satisfied in your own minds from all the evidence introduced at the trial that the defendant did the acts complained of, or some of them, your verdict must be for the defendant.

The court instructs the jury that this action is brought by the plaintiff for the purpose of recovering a penalty as a punishment for the alleged commission of an offense by the defendant, and in order to entitle the plaintiff to recover said penalty the legal evidence introduced at the trial, all taken together, must be such as clearly satisfies you of the truth of the acts with which defendant

is charged. It need not be such as to exclude all doubt, but must be such as satisfies your minds and judgment that the defendant did or caused or procured the acts in question to be done; and if, after weighing all the evidence introduced at the trial, both for the plaintiff and for the defendant, you are not clearly satisfied that the defendant caused or procured the acts in question to be done, then your verdict must be for the defendant.

You are instructed that if, at the time the defendant employed W. W. Carney to secure laborers for it in its construction camp, it instructed said W. W. Carney to only engage or hire laborers on the American side in Arizona, and not to hire or engage any laborers in Mexico nor to make any offers or promises of employment
266 of any kind to any one in Mexico, and such instruction was given to said W. W. Carney in good faith by the defendant, then your verdict must be for the defendant, unless you should further find from the evidence that the defendant subsequently, with knowledge of the fact that the forty-five Mexicans mentioned in the complaint had, in Mexico, been offered or promised employment in the United States, ratified the unauthorized act of said W. W. Carney, or those under him, and assisted the said Mexicans to migrate into the United States in the manner charged in the complaint.

You are instructed that a corporation is not liable criminally for the unauthorized acts of its subordinate agents or servants, unless such corporation participated in or assented to or directed the commission of the act of its agent or servant, and thought you may find from the evidence that one W. W. Carney, either himself or through C. F. Holler and Company, or through any employee or agent of said W. W. Carney or C. F. Holler and Company, did or committed acts in violation of the immigration laws of the United States, and while so doing such unlawful act or acts, purported and pretended to act as the agent or agents for the defendant, nevertheless the defendant is not liable in this action for the unlawful acts of the said W. W. Carney, nor for the unlawful acts of the said C. F. Holler and Company, unless the defendant authorized, participated
267 in or directed the commission of such unlawful acts, or knowingly acquiesced therein.

You are instructed that if you find from the evidence that one W. W. Carney or C. F. Holler and Company, or any partner, employee or servant of said Carney or Holler and Company, transported the Mexicans over a line or lines of railroad into the United States, by means of passes, and if you further find that such pass or passes were not furnished to said W. W. Carney or to C. F. Holler and Company by the defendant, nor at the instance or request of the defendant, express or implied, but were furnished to them by a railroad company or companies, not at the instance of the defendant, then that fact does not prove the allegation in the complaint that the defendant furnished or caused to be furnished conveyance and transportation to the said Mexicans. I instruct you, further, that the converse of that is true; that if the defendant did knowingly cause the transportation to be furnished to these people named in

the complaint, and they were alien laborers, if you find them to be alien laborers, or requested Carney, either directly or indirectly, expressly or impliedly, to furnish the transportation and conveyance then the allegations of the complaint in that respect would be satisfied.

You are instructed that if you find from the evidence that W. W. Carney or C. F. Holler and Company paid the expenses of the said Mexicans on their trip from Hermosillo, in the State of
268 Sonora, Mexico, into Naco, Arizona, such payment does not establish or prove the allegations in the complaint that the defendant paid said expenses, unless you further find, from the evidence, that the defendant authorized or directed or assented to the payment of such expenses, or agreed and promised to reimburse the said W. W. Carney or C. F. Holler and Company for said expenses paid by the said W. W. Carney or C. F. Holler and Company, upon the trip of said Mexicans from Hermosillo, Mexico, to Naco, Arizona.

The Court instructs the jury that it was at all times proper to employ alien Mexican laborers at Nogales, Arizona, or Naco, Arizona, who were already there and had not been induced or solicited to migrate there from Mexico, or other foreign country, by offers or promises of employment, or in consequence of agreements, oral, written or printed, express or implied, to perform labor for the defendant in Arizona, of any kind, skilled or unskilled. That is to say, it was at all times proper to employ Mexican citizens who had come to this country not in violation of the immigration laws, who had come properly, and who had not come as the result of any promise or inducement or offer of employment.

The Court instructs the jury that in order to find any verdict in favor of the plaintiff and against the defendant corporation, the jury must be satisfied from the evidence that a principal or
269 responsible officer of the defendant corporation, such as the president, vice president, secretary, general manager, assistant general manager or superintendent or foreman in charge of the works, or foreman in charge of men and having the power of employing or discharging men, knowingly assisted or knowingly encouraged or knowingly solicited or knowingly caused others to assist or encourage or solicit the migration or importation of an alien Mexican contract laborer into the United States.

The jury are instructed that if they are clearly satisfied from the evidence that the defendant corporation, Grant Brothers Construction Company, knowingly assisted, encouraged or solicited the migration or importation of any or all of the persons named and described in any or all of the separate causes of action set forth in the complaint in this case; and if they further believe from the evidence that any or all of such persons so named in said complaint were, at the time of such assistance, encouragement, and solicitation, alien laborers, they should, by their verdict, find for the plaintiff, United States of America, in the sum of one thousand dollars for each and every one of such persons so named in said complaint, and so knowingly induced, assisted and encouraged by the defendant corporation. I desire to explain to you, which is something you

probably already know, gentlemen, that in giving these instructions I am not assuming any of the facts to exist. I am only giving the instructions as to the law, and it is for you to find the facts. So that when I give an instruction that "so knowingly assisted, induced and encouraged by the defendant corporation," that is only an application of the law if the facts are so found by you. You are the sole judges of the evidence in the case. I don't want you to take it that I am assuming any fact to exist.

The jury are further instructed that the amount of the penalty provided by law in this case is not in any way a matter that should influence you in determining the facts of the case. The wisdom or lack of wisdom of Congress in adopting such regulation is not such matter as can properly come within the purview of the jury's consideration. The fact that the law states that the penalty is one thousand dollars for each violation thereof settles the question of the amount for each of such violations finally, and the fact that such penalty is in the amount of one thousand dollars should not be considered by the jury in any way in arriving at a determination of the facts in this case.

All corporations necessarily act through their officers and agents. All acts performed by duly authorized agents of a corporation are binding upon the corporation. All acts done by agents or servants of corporations, even when without the apparent scope of the authority of such officers and agents, if ratified and acted upon by the corporation with the knowledge that such officers, in performing such acts, did so without the direct authority of the corporation, are binding upon the corporation.

You will observe that the statute covering the case now before you for consideration makes it a necessary condition that the acts and things charged to have been done by the defendant herein must have been knowingly done by the defendant. The Court instructs you, however, that the word "knowingly," as it appears in the statute, is used in its ordinary sense, and it should by you be given the same interpretation that it receives in its ordinary acceptance.

In this case it is not essential that the Government should bring positive evidence here to show, or to have somebody swear that the corporation itself, or acting through its president, vice president or general manager, secretary, treasurer or board of directors, actually and personally took part in the offers, inducements and solicitations made to the persons named in the complaint herein, or any of them, if you believe from the evidence that such inducements, offers and solicitations were made to the persons named in the complaint or any of them, nor is it necessary that it should be admitted by any of the officers or agents of the defendant corporation that they knew that any such offers, inducements or solicitations were made as charged in the complaint, but it is incumbent on the Government to prove not only that the persons named in the complaint, or some of them, were alien laborers, and actually entered the United States of America from the United States of

Mexico, as a result of the offers, inducements and solicitations so charged to have been made, but some circumstances which would warrant the inference that such corporation and its officers and authorized agents knowingly encouraged and permitted it to be done. In other words, if the Government proves facts and circumstances which clearly satisfy you that the corporation, through its officers and authorized agents knew that such offers, inducements and solicitations would likely be made, and encouraged and permitted the making thereof, knowing that such persons, or any of them, would likely be induced to come to the United States of America from the United States of Mexico, as a result of such offers, inducements and solicitations, then you could properly say that the defendant corporation knowingly made the offers, inducements and solicitations charged in the complaint, if you believe from the evidence that such offers, inducements and solicitations were so made and that the persons named in the complaint, or some of them, were alien laborers and came from the United States of Mexico to the United States of America, as a result of the making of such

offers, inducements and solicitations.

273 Where knowledge is an essential ingredient of a cause of action, the existence of the knowledge becomes a question to be determined by the jury, upon a consideration of all the facts and circumstances in the case.

Under the law, gentlemen of the jury, you are the sole judges of the credit that ought to be given to the different witnesses, and controverted questions of fact are solely for your consideration. In determining the credit that ought to be given the witnesses, you have the right to take into consideration their opportunities for seeing and knowing the things about which they testify; their interest or lack of interest in the result of the suit, and the probability or improbability of the truth of their several statements when taken in connection with the other evidence in the case.

I have caused to be prepared, for your convenience, forms of verdict. One of these finds for the plaintiff—the Government—specifically, upon each of the forty-five counts of the complaint, and fixes the amount of recovery at forty-five thousand dollars. Another finds upon each and all of the counts in favor of the defendant. Another is designed for your use in the event you find for the Government upon one or more of the counts, but not upon all of them, and for the defendant upon one or more of the counts. If you so find, then

274 you will specify the counts upon which you find for the Government, and the amount of the recovery, and specify the counts upon which you find for the defendant. That is to say, you may find for the Government on some of the counts, and for the defendant on others. This latter form of verdict to which I have called your attention is designed for your use in specifying the counts upon which you find for the Government, one thousand dollars upon each of the counts on which you find for the Government; and then also specify in the verdict the counts upon which you find for the defendant. Upon each of the counts that you find for the

government, if you do find for the Government, you must assess the recovery at one thousand dollars.

When you have reached a verdict in the case, gentlemen, you should cause one of your number as foreman to sign the verdict that represents your conclusion, and return it into court. You should give careful and candid consideration to the testimony that has been produced before you, and fairly and honestly pass upon the controverted questions of fact that are submitted to you, applying to the evidence in the case the rules of law which I have given you.

A JUROR: I would like to ask the date of that so-called contract between Mr. Carney and the defendant; I have forgotten the date of it.

The COURT: I am afraid, gentlemen, that you will have to rely upon your recollection for the evidence, now.

275 The JUROR: I thought possibly we were allowed to get that. I had just forgotten the date.

The COURT: If the counsel consent to it, one or the other of them may state it.

Mr. MORRISON: As Mr. Dockweiler and I remember the testimony, it was the latter part of August or the first part of September. The actual date was not fixed, I believe.

Exception to the Instructions.

Mr. MORRISON: Now, of course we except to Your Honor's giving all of the instructions which you have given for the defendant, either in their entirety or in modified form; and I believe Your Honor gave all the instructions requested by the plaintiff, except they were modified. We except to Your Honor's modifications.

Mr. DOCKWEILER: Now cannot we stipulate that inasmuch as practically all of the instructions are in writing—they are all in writing—cannot we now stipulate that those instructions given by the court on its own motion are deemed excepted to by both the plaintiff and the defendant; and also that all instructions given by the court at the suggestion or request of defendant are deemed excepted to by the plaintiff; and also that all instructions requested by the

276 court by the Government and modified are deemed excepted to; and then all instructions given by the court on its own motion are deemed excepted to by the defendant; and that all instructions given by the Court at the request of the Government are deemed excepted to by the defendant. And that all instructions requested by the defense, of the Court, and modified, are deemed excepted to as to the modification. And that the action of the court in refusing instructions requested of the court by the defendant and refused to be given, is deemed excepted to. And generally and specifically each act of the Court is deemed excepted to by each side against whom the same may be taken. And it is further stipulated that every action of the Court in instructing the jury is deemed as having been fully and specifically excepted to by the party against whom such act might militate.

Now that stipulation is to apply to both the plaintiff and the defendant, Your Honor. Is that correct, Mr. Morrison?

Mr. Morrison: Oh, yes, that is all right. I don't think it is necessary, but I have no objection to it.

And afterward, and on the 8th day of June, 1910, and not in open court, the attorneys for the respective parties hereto stipulated as follows:

It is stipulated and agreed by both plaintiff and defendant, in open court, that each and every instruction and each and every part of each instruction given to the jury by the court on its own motion or at the request of defendant is and are deemed excepted to by plaintiff; and also that each and every modification made by the court to instructions requested to be given by the plaintiff is deemed excepted to; and that each and every refusal of the court to give instructions requested by the plaintiff is deemed excepted to; and also that each and every instruction and each and every part of each instruction given to the jury by the court on its own motion or at the request of plaintiff is and are deemed excepted to by defendant; and also that each and every modification made by the court to instructions requested to be given, by defendant, is deemed excepted to; and also that each and every refusal of the court to give instructions asked for by defendant is deemed excepted to; and that the foregoing stipulations shall be inserted in and be deemed a part of the reporter's notes.

June 7, 1910.

J. E. MORRISON,

Attorney for Plaintiff.

A. C. BAKER AND

ISIDORE B. DOCKWEILER,

Attorneys for Plaintiff.

Reporter's certificate certifies that the foregoing transcript is a full, true and correct copy of all questions propounded to witnesses and the answers thereto, and of the remarks, rulings, opinions and judgments rendered at the trial by the judge presiding.

Endorsed.

It is hereby agreed by counsel for the Appellee that the foregoing transcript is correct.

Dated at Tucson, Arizona, this 24th day of September, 1910.

J. E. MORRISON,

Attorney for Appellee.

Filed, September 24, 1910.

Presented to Hon. John H. Campbell, Judge, this 24th day of September, 1910.

I hereby certify that the within transcript is correct.

Dated this 24th day of September, 1910.

JOHN H. CAMPBELL, *Judge.*

Refiled, September 24, 1910.

Exhibits.

PLAINTIFF'S EXHIBIT "1."

B. S. I. No. 27.

279 At a meeting of a board of special inquiry, held in the office of the Inspector in Charge, Naco, Arizona, October 29, 1909, at 7:20 P. M.

Members present:

Alfred E. Burnett, Chairman and Secretary.

M. H. Jones, Member.

George Lockwood, Member and Spanish Interpreter.

Case of Non-Statistical aliens:

Benito Acuna	Alberto Luna
Jose Acuna	Francisco Lusania
Jose G. Arias	Mariano Marin
Susano Benitez	Manuel Mejia
Daniel Cabezul	Donicio Nunez
Nicholas Castaneda	Leocadio Parra
Martin Coronado	Manuel Peralta
Francisco Corrales	Rumaldo Peraza
Jesus Cota	Gurmerkindo Portillo
Ramon Enriquez	Calixto Ramos
Manuel Escobosa	Eduardo L. Rivera
Simon Espinosa	Juan Rodriguez
Teodoro Garcia	Alberto Ruiz
Alberto Gomez	Francisco Salazar
Trinidad Gomez	Manuel Tona
Juan Maria Gonzales	Abelardo Torres
Jesus Guevarra	Manuel Valencia
Nicholas Hernandez	Augustin Valenzuela
Felipe Jimenez	Antonio Vernal
Eustaquio Leyva	Francisco Vidal
Julian Leyva	Eulalio Zamora
Andres Lopez	Pedro Zepeda
Ricardo Lopez	

280 Board Member JONES: I move that the applicants before the board, namely: Benito Acuna, Jose Acuna, Jose G. Arias, Susano Benitez, Daniel Cabezul, Nicolas Castaneda, Martin Coronado, Francisco Corrales, Jesus Cota, Ramon Enriquez, Manuel Escobosa, Simon Espinosa, Teodoro Garcia, Alberto Gomez, Trinidad Gomez, Juan Maria Gonzales, Jesus Guevarra, Nicholas Hernandez, Felipe Jimenez, Eustaquio Leyva, Julian Leyva, Andres Lopez, Ricardo Lopez, Alberto Luna, Francisco Lusania, Mariano Marin, Manuel Mejia, Donicio Nunez, Leocadio Parra, Manuel Peralta, Humaldo Peraza, Gurmerkindo Portillo, Calixto Ramos, Eduardo L. Rivera, Juan Rodriguez, Alberto Ruiz, Francisco Salazar, Manuel

Tona, Abelardo Torres, Manuel Valencia, Augustin Valenzuela, Antonio Vernal, Francisco Vidal, Eulalio Zamora and Pedro Zepeda, be each and all excluded from admission to the United States as alien contract laborers, in accordance with Section 2, of the Act approved February 20, 1907.

Board Member LOCKWOOD: I second the motion.

CHAIRMAN: I concur.

Aliens notified of their exclusion and right of appeal, which right, after consultation with the Mexican Consul at Naco, Arizona, they waive.

Case closed 11:15 a. m.

281 I hereby certify that the foregoing is a true copy of the minutes taken by me at this hearing.

ALFRED E. BURNETT, *Secretary*.

PLAINTIFF'S EXHIBIT "2."

(Translation, original in Spanish)

Face.

Cananea, Yaqui River & Pacific Railroad

Pass G. S. Randall

Subject to conditions on back hereof

From Naco to Nogales

Account Grant Bros. Con. Co.

Not good unless countersigned by J. A. Small

Date 10-29-1909 Void after Oct. 31, 1909

No. 7143

R. H. INGRAM,
General Manager.

[On left margin:] Countersigned: J. A. Small.

[On right margin:] Not transferable.

Back.

Obligations of the Holder of This Pass Ticket.

This Pass ticket is gratuitous, personal and not transferable; it contains no contract of transportation and therefore Title X, Book Two of the Commercial Code and Chapter IV, Title Thirteen Book Three of the Civil Code are not thereto applicable.

282 .By its mere acceptance and use, the person in whose favor it is issued obligates himself:

1st. Not to assign or transfer it to a third person, even by gratuitous title.

2nd. To write his signature in ink at the place indicated at the bottom hereof, and to establish his identity thereby or otherwise, to the satisfaction of the Conductors when so demanded by them.

3rd. To make no demand of indemnity or enforce civil liability in case of accident, nor to bring any suit or make any claim whatsoever against the Company for the injuries, damages and losses suffered to his person or property.

In case the holder refuses to prove his identity, or any other person than the one in whose favor it is issued, uses it, it is the duty of the Conductors to take up this document and charge such holder full fare, without prejudice to such civil and criminal actions against such holder, as the Company may be entitled to bring. The lawful holder hereof is entitled to transport 75 kilograms of baggage free.

G. R. RANDALL.

Signature of party in interest.

PLAINTIFF'S EXHIBIT "3."

Photograph of the group of alleged aliens.

PLAINTIFF'S EXHIBIT "4."

Photograph of group of alleged aliens.

283

PLAINTIFF'S EXHIBIT "5."

Telegram on blank of Western Union Telegraph Company reading:

"Received at
2 S Le Jg 13 Paid
Nogales, Ariz. 29.

Received
Oct. 29, 1909

Immigration Service, Naco, Ariz.

U. S. Immigration Office, Naco, Arizona:

There will be about seventy Mexican laborers in there today for Grant Bros.

W. W. CARNEY.
10:55 A. M."

PLAINTIFF'S EXHIBIT "6."

Form 2327.

Ferrocarril De Cananea, Rio Yaqui y Pacifico.

Oficina Del
W. W. Carney

Received
Oct. 27, 1909

In reply please
refer to No. 107.

Im-igration Service, Naco, Ariz.

NOGALES, ARIZONA, Oct. 26th '09.

U. S. Em-igration Office Naco, Naco, Arizona.

DEAR SIR: We have been shipping Mexican Laborers from her- to Grant Bros. Con. Co. at Courtland, have shipped about 400 in the

last six weeks, but as the work now has gotten closer to Naco than any place, we are going to ship via Naco, a wagon will come in from the Camp to take their bedding, and the men out to Camp. All the men who have gone from here have passed through you- Emigration Office here, and in talking with Mr. Miller to day, he said the same arrangement would be held at Naco, as these men are only going in to the U. S. for temporary work they have not examined them as closely as they would have, had they been going into to stay, we will probably have a lot in there Friday of this week, and will be send them a long as they show up here, We trust we shall get along with your Office as pleasantly as we have with the Office here, we do not want, or will not take a man who has not been passed upon by your Office, It is our desire and intention to comply strictly will your requirements, and be guided by them, Thanking you for any assistance you may render us I am
Yours truly,

W. W. CARNEY,
Forwarding Agent.

PLAINTIFF'S EXHIBIT "7."

Form 2327.

F7rrocarril De Cananea, Rio Yaqui V Pacifico.

In Reply please refer to No. 107.

NOGALES, ARIZONA, Oct. 28th, '09.

Oficina Del W. W. Carney, Immigration Office, Naco, Arizona.

285 DEAR SIR: As I wrote you the other day, am sending about 80 men from here to Naco, these men will all go through your office, they are going out to Grant Bros. Con. Co. camp, where they are to work, from a phone message received day before yesterday, I learn they are hard pressed to get men to keep the camps running, as the men only work a day or so, it is necessary to keep a lot on the way most of the time, What I am most anxious about, is that there will not be any unnecessary delay in Naco, When we first began shipping out of here the Immigration Office here was much more careful than they have been of late, in this respect, when we first began shipping, they closely examined each any every man, wrote all his history on blanks prepared for that purpose, had a Doctor examine him etc. but when they found out the men did not intend to remain long in the U. S. and that most of them worked but a few days, they were not so particular, they always took their names, ages etc. but did not go through the long examination they would have had the men staid in the U. S. We want as little delay as possible, for the reason the men desert so fast, that we loose a great many in transit. I spoke to Mr. Miller here to day, he said as you had been stationed at El Paso, where men were crossing continually, you would understand these, We wish to do nothing that is not in

full accord with your duties, but any favor that can be shown us,
we will surely appreciate.

286 We will have them coming in all sized lots for a week or
so, or until they tell us to stop,

Yours truly,

W. W. CARNEY.

PLAINTIFF'S EXHIBIT "8."

Ferrocarril De Cananea, Rio Yaqui y Pacifico.

In Reply Please Refer to No. —
Oficina Del W. W. Carney.

NOGALES, ARIZONA, Oct. 28th, '09.

D. R. McDonald, Naco, Arizona.

DEAR MR. MC.: Kindly give the man in charge of the men a receipt for that he delivered to you there in Naco, Mr. Jas. A. Cashion, said we would get our receipts in Naco, and not when the men arrived in the various camps, Shall have a lot more, I expect Saturday, I wish you would wire me before you go out of town, telling me where and to whom I shall wire, as we will be sending some every day or so, we must let you know when to meet us, please be sure and attend to this I want the men to return immediately, so they can go back with another lot, we will try and keep you going if we can make every think OK with the Immigration office, I am writing him to day, all the men we ship must go through
287 his office or we will not take them, or be in any way responsible. Be sure and let me know where a wire will reach camp, or some body who will attend to the wagon.

Yours truly,

W. W. CARNEY.

PLAINTIFF'S EXHIBIT "9" (ENVELOPE).

Cananea, Yaqui River & Pacific R. R. Co.

D. R. McDonald,

or man in charge of Wagon,

Naco, Arizona.

PLAINTIFF'S EXHIBIT "10."

Cananea, Yaqui River & Pacific Railroad.

Going Pass.

1909.

I passed G. S. Randall 29
From Nogales,
To Naco,
Account Grant Bros. Con. Co.
Made out by J. A. Small
In accordance with the attached pass.
Void if detached.
No. 7143.

288

PLAINTIFF'S EXHIBIT "11."

Face.

Cananea, Yaqui River & Pacific Railroad
 Pass A. Castaneda and 45 laborers
 Subject to conditions on back hereof
 From Hermosillo to Lomas
 Account laborers
 Not good unless countersigned by H. J. Temple
 Date Oct. 28, 1909. Void after Oct. 28, 1909.
 No. D-4870.

R. H. INGRAM,
General Manager.

[On left margin:] Countersigned: H. J. Temple.

Back the same as back of Plaintiff's Exhibit "2."

PLAINTIFF'S EXHIBIT "12."

Conductor's Collection Report.

Train No. One.
 Leaving Guaymas at 8:20 A. M.
 Arriving at Nogales at 7:40 P. M.
 Date leaving Oct. 28, 1909.
 (Signed)

A. J. WAMSLEY, *Conductor.*

Containing the following entry, amongst others: "Record of Annual and Time Passes," "D-4870 A. Castaneda and 45 Hermo-Lomas."

PLAINTIFF'S EXHIBIT "13."

Passenger Conductor's Car Report of Same Train as Shown in Plaintiff's Exhibit "12."

Initial	Name	From	To	Destination	Contents
289	or Number 2302.	1295	1123	Lomas	Laborers

PLAINTIFF'S EXHIBIT "14."

Passenger conductor's car report showing car 2302 as taken from Del Rio to Naco on October 29th on train No. 21.

(Signed)

W. W. BENNITT, *Conductor.*

PLAINTIFF'S EXHIBIT "15."

Conductor's collection report containing the entry amongst others under "Record of Annual and Time Passes." "Trip 7142 from Del Rio to Naco," and "Trip 7143 from Del Rio to Naco."

(Signed)

W. W. BENNITT, *Conductor.*

PLAINTIFF'S EXHIBIT "16."

On telegram blank.

"October 29

Received of G. Randall 17 men

D. R. McDONALD."

DEFENDANT'S EXHIBIT "1."

Contract under date of August 10, A. D. 1909, between the Arizona and Colorado Railroad Company, party of the first part, referred to in the contract as "The company" and Grant Brothers Construction Company party of the second part, referred to in the contract as the "contractor" containing the following material provisions: (clause relating solely to construction omitted)

290 The company agrees to provide without cost to the Contractor:

(a) Transportation for stock, grading and camp equipment from points on lines owned or controlled by the Southern Pacific Company between Los Angeles, California, and El Paso, Texas, to Kelton, Arizona, and the return of the same to the point of origin.

(b) Transportation for common laborers from points on lines owned or controlled by the Southern Pacific Company within the Territories of Arizona and New Mexico to Kelton, Arizona, but will provide no return transportation for such employees.

DEFENDANT'S EXHIBIT "2."

COURTLAND, 10-23.

W. W. Carney, Nogales.

DEAR SIR: As it is slow and expensive getting men in by Kelton, and as the most work is near Naco, we think that you had better ship to that point, see if you cannot provide the men with some kind of a card or paper from the immigration office that will allow them to cross the line at Naco. they can then easily walk 8 miles to our first camp

Yours truly,

291

GRANT BROTHERS CONSTRUCTION CO.

By C. E. P.

(Stamp.)

(Stamped:) Received
Oct. 26, 1909,
office of
Forwarding Agent

The foregoing Abstract of Record is filed in accordance with Rule 1 of the Supreme Court.

A. C. BAKER,
ISIDORE B. DOCKWEILER,
Attorneys for Appellant.

292 And on to-wit: the tenth day of January, 1911, being one of the regular juridical days of the January Term of said court, 1911, the following order, inter alia, was had and entered of record in said cause in words and figures following to-wit:

Title of Cause.

At this day, it is ordered by the Court that appellant and appellee herein, each be granted one and one-half hours for oral argument in this cause, and the hearing set for January 17, 1911.

And on to wit: the eleventh day of January, 1911, there was filed in the clerk's office of said court in said entitled cause a certain Stipulation in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

UNITED STATES OF AMERICA, Plaintiff and Appellee,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, Defendant and Appellant.

Stipulation.

It is hereby stipulated and agreed by and between the above named parties, that the original envelope now on file with the Clerk of the Supreme Court in the record on appeal in the above entitled cause, be and the same is hereby substituted for the photographic copy thereof, which appears on pages 11 and 12, abstract of the record.

293 It is further stipulated that the appellant did not at any time attempt to file any cross interrogatories, either in the office of the Clerk of the First Judicial District of the Territory of Arizona, or in the office of the Clerk of the Second Judicial District of the Territory of Arizona.

Witness our hands at Bisbee, Arizona, this 10th day of January, A. D. 1911.

BAKER & BAKER,
I. B. DOCKWEILER,
Attorneys for Appellant.
J. E. MORRISON,
Attorney for Appellee.

And on to-wit: the seventeenth day of January, 1911, being one of the regular juridical days of the January term of said court, 1911,

the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of A. C. Maker, Esq., attorney for appellant herein, it is ordered by the Court that he be granted leave to make additions to brief.

294 And on the same day to-wit; the seventeenth day of January, 1911, being one of the regular juridical days of the January term of said court, 1911, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day, on motion of I. B. Dockweiler, Esq., attorney for appellant herein, it is ordered by the Court that he be granted fifteen days within which to file reply brief.

And on the same day, to-wit: the seventeenth day of January, 1911, being one of the regular juridical days of the January term of said court, 1911, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

This cause coming on at this time for hearing was argued by A. C. Baker, Esq., and I. B. Dockweiler, Esq., for appellant, and J. E. Morrison, Esq., for appellee, and cause ordered submitted.

295 And on to-wit: the twenty-seventh day of March, 1911, there was filed in the clerk's office of said court in said entitled cause a certain Opinion in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1173.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation.
Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the First Judicial District.

Before Honorable John H. Campbell, Judge.

Messrs. Baker & Baker, Isadore B. Dockweiler and F. C. Struckmeyer, for appellant.

Mr. J. E. Morrison, United States Attorney, and Mr. J. C. Forest, Assistant United States Attorney, for appellee.

Opinion by Kent, C. J.

The appellant, Grant Brothers Construction Company (whom we shall hereafter designate as the Construction Company,) is engaged in the business of a railroad contractor, and in the year 1909 was building a line of railroad between Kelton and Naco, Arizona. The construction work required the services of a large number of laborers, and as such laborers were constantly leaving the employment, the work necessitated the constant employment of new laborers to take the place of those leaving, some five thousand laborers in all having been from time to time employed. The officer of the Construction Company in charge of the employment of the men was Angus Cashion, its assistant general foreman. During the latter part of August or the first of September, 1909, Angus Cashion entered into an oral contract with one W. W. Carney at Nogales, Arizona, to furnish the Construction Company laborers for its construction camps in Arizona, agreeing to pay Carney a dollar a head in gold for every laborer delivered to its camps and twenty cents per meal while en route from Nogales, Arizona, to the construction camps. It having come to the attention of the authorities that laborers for the Construction Company were being brought into this country from Mexico, the United States brought an action in the District Court against the Construction Company to recover a penalty under sections 2, 4 and 5 of the Act of Congress approved February 20th, 1907, entitled, "An Act to Regulate the Immigration of Aliens into the United States," 34 Stat. 898; Fed. Stat. Ann. Supp. 1907, 96. The complaint contained forty-five counts; the first count alleged that on the 29th day of October, 1909, the Construction Company induced and solicited and caused to be induced and solicited by offers and promises of employment as a laborer for the Construction Company, one Benito Acuna to migrate from the United States of Mexico into the United States of America, and that

297 upon such offers and promises the said Acuna did migrate from the United States of Mexico to the United States of America, and that the Construction Company assisted and encouraged and caused to be assisted and encouraged the importation and immigration of the said Acuna into the United States and furnished and caused to be furnished conveyance and transportation to the said Acuna, and paid and caused to be paid the expenses of this trip from Hermosillo, State of Sonora, United States of Mexico, into Naco, Territory of Arizona in the United States of America. The count further alleged that the said Acuna was an unskilled laborer and not one of the classes of persons exempt from said Act of Congress. The allegations of the remaining forty-four counts of the complaint are identical with the first count except that a different alien is named in each count. Each count prays judgment for one thousand dollars, and the complaint concludes with a prayer for judgment against the Construction Company for forty-five thousand dollars. The Construction Company interposed a general denial, and upon the issues so formed the jury returned a verdict against the appellant on all of the forty-six counts of the complaint and fixed the amount of the recovery of the United States at Forty-five thousand dollars. Upon this verdict a judgment was entered and from this judgment and an order denying a motion for a new trial the Construction Company has appealed to this Court.

It is conceded by the appellant that the provisions of the Act in question were violated by Carney and his associates and subordinates, and that in the carrying out of the contract between him and the Construction Company Carney and his associates and subordinates, by offers and promises of employment, directly procured the importation and migration of contract alien laborers into the United States, and the record amply bears out this concession. It is claimed, however, by the appellant that the acts done in violation of the law were the acts of Carney and his associates and subordinates and not the acts of the Construction Company, done without the knowledge, assent or ratification of the Company and for which it is in no way responsible, and that the verdict and judgment of the court is contrary to law in that it is not supported by the evidence.

The sections of the Act, so far as material, are as follows: "Sec. 2. That the following classes of aliens shall be excluded from admission into the United States: * * * persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled; * * * (34 Stat. L. 898.)" "Sec. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of

the last two provisos contained in section two of this Act. (34 Stat. L. 900.)"

"SEC. 5. That for every violation of any of the provisions of section four of this Act the persons, partnership, company, or corporation violating the same by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States. (34 Stat. L. 900.)"

It is to be noted that the Act is broad and comprehensive in its terms. By Section four it is made a misdemeanor for any person or corporation in any manner whatsoever to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer into the United States unless
 300 such laborer be of the class exempt, and that by section five provision is made for the bringing of an action to recover a penalty against any person violating the provisions of section four by knowingly assisting, encouraging or soliciting the migration or importation of any such contract laborer into the United States. In order to warrant a recovery in the action, the violation of the Act must have been knowingly done by the person sought to be held responsible. Under the Act it is not sufficient that the defendant sought to be charged assisted, encouraged or solicited the importation of a contract laborer into the United States, unless such was done knowingly; but a corporation as well as an individual is capable of forming a guilty intent and capable of having the knowledge necessary, provided the officers of the corporation capable of voicing the will of the corporation have such knowledge or intent. This Act, a statute of the United States, being penal in its consequences, must be strictly construed, and as knowledge is the principal and indispensable ingredient in the offense, the Government, the plaintiff in the case, must be held to proof of such knowledge or to proof of circumstances from which it might be fairly inferred. Unless the evidence, therefore, affords proof of knowledge by the Construction Company, or proof of circumstances from which such knowledge may be fairly inferred, of the acts of Carney and his associates, the Construction Company cannot be held liable for such illegal acts
 301 of Carney, for the master or principal is not liable criminally for the unlawful acts of his agent or servant though such unlawful act be committed in the master's business, unless such unlawful act was directed by him or knowingly assented to or acquiesced in. A clear definition of what is meant by legal knowledge is found in the language employed by Judge Nixon in

charging the jury in the case of the United States v. Houghton, 14 Fed. 544, which was a criminal prosecution based upon section 5418 of the Revised Statutes of the United States making it a misdemeanor for any person to present to any officer of the United States any false, forged or altered public record and other writing knowing the same to be false. "What is legal knowledge of a fact? There is great misapprehension in the popular mind on this subject. There seems to be a prevalent notion that no one is chargeable with more knowledge than he chooses to have; that he is permitted to close his eyes, when he pleases, upon all sources of information, and then excuses his ignorance by saying that he does not see anything. In criminal as well as civil affairs every man is presumed to know everything that he can learn upon inquiry, when he has facts in his possession which suggest the inquiry. This knowledge of the defendant must be affirmatively shown by the government. Except in the case of confession it is generally impossible to make it out by direct evidence, and can only be inferred from overt acts. Wharton, in discussing the subject, says that if the knowledge cannot be implied from the facts and circumstances which, together with it constitute the offense, other acts of the defendant from which it can be implied to the satisfaction of the jury, must be proved at the trial."

302 It is the contention of the appellant that the testimony adduced in the cause is not sufficient to show knowledge on the part of the Construction Company of the acts complained of.

The testimony is voluminous, consisting partly of oral testimony and partly of depositions read in evidence. The testimony of the plaintiff tended to show the following facts: The contract between Angus Cashion and Carney above referred to, whereby Carney was to furnish laborers to the Construction Company, Carney to receive a dollar a head in gold and twenty cents a meal for feeding the men enroute; that Carney was a man who had had business relations with the Construction Company for several years prior to the making of the agreement; that Carney stated that he was going to open offices to secure the laborers in Nogales, Naco and Douglas, Arizona; that these three towns are along the border between Arizona and Mexico; that Carney's office was in Nogales, Mexico, though his house was in Nogales, Arizona; that Carney employed the firm of C. F. Holler & Company, whose offices are in Nogales, Arizona, which firm was composed of C. F. Holler and C. J. Ruppelius, offering to pay them fifty cents of the dollar that he was to receive for each laborer. Between the time of making the contract and the 29th of October, 1909, approximately 450 men were delivered under this contract to the Construction Company at their works in Arizona, 95 per cent of whom were Mexicans, and at least eighty of these had been brought up from Hermosillo, Mexico, where they had been openly employed to work for Grant Brothers Construction Company through the solicitations of Ruppelius, and, having successfully evaded the interrogations of the immigration officers, presented themselves at the American offices of Holler & Company in Nogales, Arizona, and were thence shipped

to the Construction Company's camp. The plaintiff showed that Ruppelius did not pay the transportation of these eighty men from Hermosillo to Nogales, that Carney did not pay for it, and that Holler & Company did not pay it, and from the fact that none of such persons interested in the contract paid such transportation, or under the terms of the contract could afford to pay it, argues that the Construction Company, the only other person interested, must have paid such transportation, or else that the railroad company transported the men free; that Ruppelius arranged with the agent of the Mexican railroad at Hermosillo for the transportation of these eighty laborers in a special car by telling the agent that the men were going to Nogales, Arizona, for the purpose of asking work from Holler & Company and that they were employed by Grant Brothers Construction Company at Cochise; that as to the forty-five laborers for the subsequent importation of whom from Hermosillo this action was brought, Carney issued a pass from Lomas, Mexico, to

304 Naco, Sonora, and charged the pass to the account of Grant Brothers Construction Company", which pass was recognized by the railroad company and charged by it to construction account; that neither Carney, Holler nor Ruppelius paid for the transportation of any of the forty-five aliens from Hermosillo to Lomas; that for such transportation in a special car a pass was issued reading "Cananea, Yaqui River & Pacific Railroad. Pass A. Castaneda and forty-five laborers from Hermosillo to Lomas, account laborers."; and argues that as the laborers could not mean the laborers of that railroad company, the pass was issued and charged to the Construction Company by some arrangement with the Construction Company not in evidence, and that the jury were warranted in so inferring; that other records and passes relating to the transportation of these men are not to be found among the records and papers in the railroad's possession, as testified to by the officials; that at the time these forty-five laborers reached Naco one D. R. McDonald, an agent of the Construction Company, was there to receive them, and that Carney expected him to be there and had addressed a letter to him there, and that Carney had told Randall, his subordinate in charge of the forty-five men, that Randall was to deliver them to McDonald at Naco who was to receipt for them and to take them to the Construction Company's camp; that Ruppelius, under the positive instructions of Carney, went several times to Hermosillo to "scatter the word" in that vicinity that laborers were wanted by Grant Brother's Construction Company. Carney

305 testified that he had received instructions by letter from the Construction Company to ship the men to Naco, and that the shipment of the forty-five men in question was the first shipment made under such instructions. McDonald, who was at Naco to receive the shipment of forty-five men, took them, by consent of the authorities, to dinner, for which he paid and charged the amount thereof to the Construction Company. Much other testimony was given tending to show acts flagrantly violative of the Act of Congress by Carney, Ruppelius and others in connection with the importation of alien laborers, and much testimony, impracticable to

condense, in relation to the failure of the records of the railroad companies in Sonora to show by whom the transportation of such laborers in Mexico was paid.

On the part of the Construction Company, Angus Cashion testified that at the time of making his contract with Carney, he said to him: "Under no conditions do you want to go into old Mexico and employ any laborer; we don't want you to solicit or talk to a man on the Mexican side."; that Nogales, Arizona, was supposed to be a good labor market. James A. Cashion, vice president and general manager of the Company, testified that on October 25th he asked Carney, "Where are you getting the men," and that he said, "In Nogales", and that he thereupon said, "You want to be sure that you get them on the American side; we don't want you to get a man on the Mexican side; we don't want you to offer him any inducements of any description, and I further instruct you not even to
306 talk to a man regarding labor on the Mexican side." On cross-examination by the defendant, Carney testified that Angus Cashion said to him, "You know the immigration laws; you know all these things, and whatever you do you must get men on the American side and not go into Mexico for men nor do anything in anyway that would complicate us in this matter." Both the Cashions testified that they had no knowledge whatever of any employment of any Mexicans in Mexico or of any attempt on the part of Carney or of any of his associates in any way to violate the Act in question; that they did not authorize the issuance of any passes in Mexico and had no arrangement with any Mexican railroad to pay for any transportation of any of these laborers, and that it was not their intention or the intention of the Construction Company that there should be any violation of the Act. In explanation of the statement of Carney that he had received instructions from the Construction Company to ship laborers to Naco, the Construction Company itself put in evidence the letter referred to by Carney, as defendant's exhibit two. This letter reads as follows: "W. W. Carney, Nogales. Dear sir: As it is slow and expensive getting men in by Kelton and as the most work is near Naco, we think you had better ship to that point. See if you cannot provide the men with some kind of a card or paper from the immigration office that will
307 allow them to cross the line to Naco, they can then easily walk eight miles to our first camp. Yours truly, Grant Brothers Construction Company, by C. E. P."

On this state of this long record, which we have but partially summarized, the defendants claim that in view of the uncontradicted facts of the instructions by the Cashions to Carney not to violate the law, the evidence on the part of the plaintiff tending to show knowledge of such violation on the part of the Construction Company is so inadequate and meagre that the verdict and judgment based thereon cannot be allowed to stand. The contention of the United States, the appellee, is that the contract between the Construction Company and Carney was entered into by a vice principal of the appellant under such circumstances that the very conversation which resulted in and constituted the contract charged him with notice

that violation of the law as charged in the complaint would necessarily or very probably be committed by Carney or agents acting by virtue of such contract; that the proof is ample to show the acquiescence of the Construction Company in these unlawful actions, and that it received the benefits of such unlawful actions under such circumstances that the Construction Company's knowledge thereof could properly be inferred, and that there is in the record such proof of the ratification of these unlawful acts; that the acquiescence in them for such a length of time and under such condition of circumstances, with the reception by the appellant of the benefits of these unlawful acts, constituted a ratification thereof.

308 We think that, though the fact of the instructions given by Cashion to Carney not to solicit men on the Mexican side is unquestioned, such instructions are important only if made in good faith and if they be not merely colorable, and that the question of the good faith of such instructions so given was one for the jury, provided the evidence on the part of the United States as to the surrounding circumstances and conditions and the knowledge of such conditions by the two Cashions was such that they either knew of the intended and actual violation of the law or was such that they wilfully and intentionally ignored facts and circumstances known to them which would have led to such knowledge. The evidence of the plaintiff standing by itself without the denials on the part of the officers of the Construction Company, seems to us sufficient to warrant the trial court in the submission of the case to the jury upon the question whether or not the Construction Company had such knowledge of the facts and circumstances as to warrant a verdict that they were guilty of encouraging or assisting the migration or importation of contract laborers. Upon the denials of the Construction Company's officials of any such knowledge or any intention to violate the law, it became a question of fact for the jury to determine both the truth of such denials and also whether or not such instructions were given in good faith. As an appellate court we may not review the weight of the evidence or determine

what interpretation we should put thereon or what verdict
309 we should render upon the facts. Our province here is simply to determine whether or not there was sufficient evidence in the record of knowledge to warrant the jury in arriving at their verdict. In a case of this character where the evidence of knowledge must depend upon the facts and circumstances as testified to by the witnesses and where direct evidence of knowledge or intent is not obtainable by the plaintiff, it is often impracticable to select any particular fact or circumstance from the record which shall in itself establish the ultimate fact sought to be reached, whereas a number of circumstances, each one insufficient in itself to establish the fact, may, when taken together, lead, and correctly lead, to the conclusion that the fact has been established. In such a case it is peculiarly the province of the jury who have the witnesses before them and may judge of their manner and demeanor, to pass upon the question of whether or not all the facts taken together satisfy

a reasonable mind of the truth of the claim, rather than for the appellate court to substitute its judgment for that of the jury. The court in the case before us charged the jury that in order to entitle the plaintiff to recover the penalty, the evidence introduced at the trial all taken together must be such as clearly satisfies the jury of the truth of the acts with which the defendant is charged, and that if after weighing all the evidence the jury were not clearly satisfied that the defendant caused or procured the acts in question to be done, that then their verdict should be for the defendant.

310 Under this charge the jury, weighing all the evidence in the case, have come to the conclusion that the evidence does clearly satisfy them thereof, and we do not think that we are authorized to disturb the verdict.

In this connection it is to be noted that the Construction Company itself introduced in evidence the letter, defendant's exhibit two, above referred to, for the purpose of explaining the statement of Carney that he had been instructed by the Construction Company to ship all laborers to Naco; but whatever the purpose, the introduction of the document in question by the defendant itself raised two questions for submission to the jury, first, as to the authority of the writer of the letter to bind the defendant company, and second, the proper meaning and construction to be given to the letter. Under the evidence in the case, which it is not necessary to set forth, the question as to the authority of the writer of the letter to speak for the company became a question for the jury and not, as claimed by the appellant, a question for the court, if, indeed, the introduction of the letter by the defendant did not operate as a waiver of that contention, and the letter having been properly admitted in evidence, the proper construction to be given to the language as showing intent on the part of the Construction Company, became one peculiarly for the jury to determine under the facts and circumstances of the case.

This action was originally brought in the Second Judicial District. On April 16th, 1910, six notices of intention of the plaintiff to apply to the clerk of the District Court of the Second Judicial District for commissions to take six depositions of witnesses residing in Mexico, together with the interrogatories to be propounded to each witness thereto attached, were prepared and dated as of that day. On the 18th of April, 1910, and before service of the notices to take the depositions had been made, the defendant Construction Company applied for and obtained an order from the court for a change of venue to the First Judicial District, and on the 21st day of April, 1910, filed the undertaking necessary to effectuate the transfer of the cause to the first Judicial District. The notices to take the depositions were served on the 22nd day of April, one day after the order of transfer had become effectual but before the record and papers had actually been transferred. The defendant company made no effort to file any cross-interrogatories either with the clerk of the Second Judicial District or with the clerk of the First Judicial District, and upon the expiration of the time specified in the notice to take depositions the plaintiff applied

to the clerk of the First Judicial District, to which the cause had then been transferred, and obtained commissions upon which the depositions of the witnesses were taken and returned to the court. At the trial the defendant company moved to suppress the depositions for want of due notice and the denial of that motion by the trial court is urged as error. The purpose of giving notice

312 of the taking of depositions as required by the statute is that the opposite party may be advised of the application for the commission to take the depositions, and that by the service of the interrogatories attached thereto they may be advised of the nature of the questions to be propounded and thereby be given an opportunity to frame such cross-interrogatories as may be desired. While the notice to take depositions in this case stated that application would be made to the clerk of the Second Judicial District, prior to the time of such application the cause had actually been transferred to the First Judicial District upon the defendant's own application. The court in the Second Judicial District having lost jurisdiction and jurisdiction having attached to the court of the First Judicial District, the defendant knew that the only place where application could be made pursuant to the notice was to the clerk of the First Judicial District, and not to the clerk of the Second Judicial District. The defendant was fully advised of the intention of the plaintiff to apply for the issuance of the commission, was served with the interrogatories to be propounded to the witnesses; the change of venue having been made upon its own motion and upon the giving by it of the undertaking required, it was certainly advised of the fact of the change and that the only place from which the commission could issue was from the office of the clerk of the court to which the case had been transferred; it

313 therefore had full opportunity to file any cross-interrogatories that might be desired and we do not believe it was necessary or fatal to the issuance of the commission that new interrogatories and new notices specifying the clerk of the court to which the cause had been transferred were not prepared and served.

It is further urged that the depositions were not properly attested as returned to the court in that the postmaster did not endorse on the envelope "that he received them from the hands of the officer before whom they were taken" and that the commissioner did not write his name across the seal of the envelope in which the depositions were returned. If without the observance of these formalities there was not a substantial compliance with the statute, the objection nevertheless has been waived by the appellant. The irregularities complained of appeared upon the exterior of the envelopes. The envelopes in each instance were opened before trial, as appears by the certificate of the clerk, upon the request of the counsel for the Construction Company. Inasmuch as it was not necessary to open the envelopes to ascertain the existence of the irregularities complained of, the opening thereof at the request of the defendant's counsel was a waiver of any irregularities in their transmission.

Killin v. Augusta Railroad Co., 3 S. E. 621.

It is further urged that the trial court erred in admitting in evidence statements made by the associates and employes of
314 Carney, on the ground that such statements were hearsay and not binding upon the defendant company. The agreement between Carney and the Construction Company contemplated that Carney should have the assistance of others in procuring laborers for the Construction Company, as in the conversation at the time of the making of the agreement it was stated that Carney intended to open offices in various cities along the Mexican line, and it was known to the Construction Company that Carney had no office in Arizona. The plaintiff upon the trial had two things to prove, first, that the importation of contract laborers into the United States *as* had been assisted or encouraged and that as a result of such assistance and encouragement such laborers had migrated to the United States, and secondly, that the defendant had knowingly assisted or encouraged such migration or importation. To prove the first fact it was proper to show the solicitation and representations made to the laborers to induce them to migrate to the United States, and that in fact it was such statements and solicitations that caused them to come. Therefore the statements of Carney and of his assistants were material and relevant as showing the acts done by them in pursuance of the contract between the Construction Company and Carney. The evidence was not received, as seems to be claimed by the appellant, to establish the extent of authority of the agent of the corporation, but to show the illegality of the migration of the laborers, and that one of the inducements to the laborers to come was that such acts had been done on behalf of the
315 Construction Company. Such statements were admissible, not as evidence of the agent's authority, but to show the acts which the agents did in the course of their employment. The fact that the evidence may also have tended to show knowledge on the part of the Construction Company does not, under the doctrine of multiple admissibility, render the evidence inadmissible because it may have tended to show such knowledge. The trial court did not err in receiving the evidence complained of.

It is further urged that the trial court erred in admitting in evidence the decision of the board of special inquiry of the United States immigration service held at the office of the inspector in charge at Naco, Arizona, in relation to the status of the forty-five laborers in question, the board having officially determined thereby that the forty-five men in question should be excluded from admission to the United States as alien contract laborers, the objection being that by this certificate and action of the board the status of the forty-five men as aliens could not be established. We think the determination and decree of a competent tribunal of the Government, established for the purpose of ascertaining the *statutes* of a person applying for admission, as to whether he is an alien or not, is relevant and competent evidence of such *statute*.

United States v. Hill, 124 Fed. 831.

316 Numerous errors have been assigned with respect to the refusal of the trial court to give certain instructions and in the giving of other instructions by the court. We do not think it necessary to set forth in detail the alleged errors complained of. With respect to the instructions that the trial court refused to give at the defendant's request, they are in each instance either inconsistent with the facts as developed upon the trial or the matters contained therein were covered by the court in its charge. With respect to the correctness of the charge as given, we think, after a careful examination of it, that it fully and fairly stated the law in the case and set forth with particularity and clearness the necessary requirements that must first be met by the plaintiff before the jury could find a verdict against the defendant in the case, and that the defendant has no cause to complain that its rights and immunity from liability under its contention as to the facts were not fully and carefully explained to the jury.

It is further claimed that the trial court erred in assessing costs against the defendant, as the statute makes no provision therefor. In such a case as this, costs follow as a matter of course to the successful party.

We find no error in the record and the judgment of the District Court is therefore affirmed.

EDWARD KENT, *C. J.*

We concur:

ERNEST W. LEWIS, *A. J.*

EDWARD M. DOE, *A. J.*

Mr. Justice Doan deeming himself disqualified took no part in the consideration of this case.

317 And on the same day, to-wit: the twenty-seventh day of March, 1911, being one of the regular juridical days of the January term of said Court, 1911, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1173.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed, that the appellee herein do have and recover of and from Grant Brothers Construction Company, a corporation, appellant herein, and The United States

Fidelity & Guaranty Company of Baltimore, Maryland, surety on Supersedeas and Cost bonds herein the sum of forty-five thousand (\$45,000.) dollars, and its costs in this court, taxed at twenty-one and 40/100 (\$21.40) dollars, together with its costs in the court below in this cause incurred, taxed at the sum of two thousand two hundred ten and 25/100 (\$2,210.25) dollars.

318 And on to-wit: the eighth day of April, 1911, came the appellant by his attorneys and filed in the clerk's office of said court in said entitled cause its certain Motion for Re-hearing, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1173.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Now comes the above named appellant and moves the Court for a rehearing of the above entitled cause upon the following grounds:

1. That this Court erred in affirming the judgment of the lower court and in holding that the evidence was sufficient to sustain the verdict.

2. That this Court erred in affirming the judgment of the lower court and in holding that it was not error in the lower court to deny appellant's motion to suppress the depositions read in evidence.

3. That this Court erred in affirming the judgment of the lower court and in holding that it was not error in the lower court to admit the testimony of the witnesses Ruppelius, Holler, Sanchez, Randall and other witnesses.

4. That this Court erred in affirming the judgment of the lower court and in holding that it was not error in the lower court to admit as evidence the finding of the Special Board of Inquiry of the United States Immigration Office at Naco, Arizona.

5. That this Court erred in affirming the judgment of the lower court and in holding that the lower court did not err in giving and refusing instructions to the jury.

6. That this Court erred in affirming the judgment of the lower court and in holding that the lower court did not err in taxing the sum of Two-thousand Two-hundred and Ten and 25/100 (\$2210.25) Dollars as costs against appellant and in overruling appellant's exceptions to said costs.

BAKER & BAKER,
ISIDORE B. DOCKWEILER,
F. C. STRUCKMEYER,
Attorneys for Appellant.

And on to-wit: the fourth day of May, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by appellant, be submitted.

320 And on the same day to-wit: the fourth day of May, 1911, being one of the regular juridical days of the January term of said court, 1911, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

Comes now A. C. Baker, Esq., attorney for appellant herein, and moves for time within which to file brief on motion for re-hearing. Whereupon the Court ordered that said motion be taken under consideration.

And on to-wit: the sixth day of May, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that appellant's motion for time within which to file brief on Motion for Rehearing, heretofore submitted be, and the same is hereby, granted and appellant is hereby granted sixty days within which to file brief on Motion for Rehearing.

321 And on the same day to-wit: the sixth day of May, 1911, being one of the regular juridical days of the January term of said court, 1911, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that appellee herein be granted thirty days after the filing of brief by appellant on Motion for Rehearing, within which to file reply thereto.

And on to-wit: the ninth day of November 1911, being one of the regular juridical days of the January term of said court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by appellant, be submitted.

And on to-wit: the tenth day of November, 1911, being one of the regular juridical days of the January term of said court, 1911,
322 the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by Appellant and heretofore submitted, be and the same is hereby, denied.

And on to-wit: the twenty-eighth day of December, 1911, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause its certain Petition for Writ of Error in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, Appel-
lant,
vs.

THE UNITED STATES OF AMERICA, Appellee.

Petition for Writ of Error.

Comes now Grant Brothers Construction Company, a corporation, appellant above named, and comes also The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation,
323 tion, and respectfully shows that the above entitled cause is now pending in the Supreme Court of the Territory of Arizona and that a judgment therein was rendered on the 27th day of March, A. D. 1911, for the sum of Forty-five Thousand (\$45,000) Dollars, and costs, in favor of the appellee and against Grant Brothers Construction Company, a corporation, the above named appellant, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, surety on the supersedeas and appeal bond of the said Grant Brothers Construction Company, a corporation, and that a petition for a rehearing in said cause was on the 10th day of November, A. D. 1911, denied by the Supreme Court of the Territory of Arizona, and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on writ of error;

Wherefore, said Grant Brothers Construction Company, a corporation, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, pray that a writ of error may issue out of the Supreme Court of the United States to the Supreme Court

of the Territory of Arizona, and that the Clerk of the Supreme Court of the Territory of Arizona be directed to send the record and proceedings of said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors, herewith filed, may be reviewed and if error be found, corrected according to the laws and customs of the United States.

324 Dated at Phoenix, Arizona, this 28th day of December, A. D., 1911.

A. C. BAKER,
ISIDORE B. DOCKWEILER,
A. B. BAKER,

Attorneys for Appellant, Grant Brothers Construction Company, a Corporation, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation.

Allowed this 28th day of December, A. D., 1911; by

EDWARD KENT,
*Chief Justice of the Supreme
Court of the Territory of Arizona.*

And on the same day to-wit: the twenty-eighth day of December, 1911, there was filed in the clerk's office of said Court in said entitled cause, a certain Order for Writ of Error, in words and figures following, to-wit:

325 In the Supreme Court of the Territory of Arizona.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA, Appellee.

Order for Writ of Error.

On this 28th day of December, A. D. 1911, came the above named appellant, Grant Brothers Construction Company, a corporation, and also The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, surety on the supersedeas and appeal bond of said Grant Brothers Construction Company, a corporation, by their attorneys, and filed herein and presented to the court their petition praying for the allowance of a Writ of Error, intended to be urged by them, together with assignment of errors, praying also that the transcript of record and proceedings and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises; on consideration whereof said writ of error is allowed upon said appellant, Grant Brothers Construction Company, a corporation, and The United States Fidelity and Guaranty Company of Baltimore,

326 Maryland, a corporation, giving bond according to law in the sum of Sixty Thousand Dollars, which shall operate as a supersedeas bond;

And it is further ordered that said petition be and the same is hereby allowed and granted and that the writ of error be allowed in said cause, returnable before the United States Supreme Court, and that the Clerk of this court sign and seal the writ of error and that a transcript of the record of all proceedings and papers in said cause shall be made and transmitted to said Supreme Court of the United States.

It is further ordered that the undertaking in the sum of Sixty Thousand Dollars, tendered by said appellant Grant Brothers Construction Company, a corporation, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, be and the same is hereby approved as the undertaking on writ of error herein.

Dated at Phoenix, Arizona, this 28th day of December, A. D. 1911.

EDWARD KENT,
*Chief Justice of the Supreme Court of the
Territory of Arizona.*

And on the same day to-wit: the twenty-eighth day of December, 1911, there was filed in the clerk's office of said court in said entitled cause, a certain Supersedeas Bond in words and figures following, to-wit:

327 In the Supreme Court of the United States.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, and
The United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Supersedeas Bond.

Know all men by these presents: That we, Grant Brothers Construction Company, a corporation, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, as principals, and National Surety Company a corporation of New York, N. Y., as surety, are held and firmly bound unto The United States of America in the sum of Sixty Thousand (\$60,000) Dollars to be paid to the said United States of America, its successors, representatives or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 26th day of December, A. D. 1911.

The condition of this obligation is such that whereas in a suit pending in the Supreme Court of the Territory of Arizona
 328 between Grant Brothers Construction Company, a corporation, the above named plaintiff in error, and the United States of America, the above named defendant in error, judgment was rendered against the said Grant Brothers Construction Company, a corporation, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, surety on the supersedeas and appeal bond of the said Grant Brothers Construction Company, a corporation, on the 27th day of March, A. D. 1911 for the sum of Forty-five Thousand (\$45,000) Dollars, with costs, and whereas a petition for a rehearing in said suit was on the 10th day of November, A. D. 1911 denied by the Supreme Court of the Territory of Arizona, and said Grant Brothers Construction Company, a corporation, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, having obtained a writ of error and filed a copy thereof in the office of the Clerk of the said Supreme Court of the Territory of Arizona, to reverse the judgment in said suit, together with a citation directed to said United States of America, citing and admonishing said United States of America to be and appear at the Supreme Court of the United States to be holden at Washington in the District of Columbia;

Now therefore, if the said Grant Brothers Construction Company, a corporation, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, shall prosecute their said writ of error to effect and answer all costs and damages
 329 if they shall fail to make their said plea good, then the above obligation to be void, otherwise to remain in full force and effect.

In witness whereof, said Grant Brothers Construction Company, a corporation, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, and the said National Surety Company, a corporation of New York, N. Y., have caused their corporate names to be signed and their corporate seals to be affixed hereto by their duly authorized agents, this, the 26th day of December, A. D. 1911.

GRANT BROTHERS CONSTRUCTION CO.,

[SEAL.] By J. A. BURTON, *Secretary.*

THE UNITED STATES FIDELITY AND
 GUARANTY COMPANY,

[SEAL.] By FRANK M. KELSEY,

*Its Agent and its Attorney in Fact,
 Principals.*

NATIONAL SURETY COMPANY,

[SEAL.] By CATESBY C. THOM, *Its Attorney in Fact,*

Surety.

STATE OF CALIFORNIA,

County of Los Angeles, ss:

On this 26th day of December in the year nineteen hundred and eleven, before me J. C. Humphreys, a Notary Public in and for

the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared J. A. 330 Burton, known to me to be the Secretary of the Grant Brothers Construction Co., the corporation that executed the within instrument, on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[SEAL.]

J. C. HUMPHREYS,

*Notary Public in and for said County of
Los Angeles, State of California.*

STATE OF CALIFORNIA,

County of Los Angeles, ss:

On this 26th day of December in the year one thousand nine hundred and eleven before me Hallie D. Winebrenner, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Frank M. Kelsey, known to me to be the duly authorized Agent and Attorney-in-Fact of The United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the Agent and Attorney-in-fact of said Company, and the said Frank M. Kelsey duly acknowledged to me that he subscribed the name of The United States Fidelity and Guaranty Company thereto as Principal and his own name as Attorney-in-fact.

In witness whereof, I have hereunto set my hand and 331 affixed my official seal the day and year in this Certificate first above written.

[SEAL.]

HALLIE D. WINEBRENNER,

*Notary Public in and for Los Angeles County,
State of California.*

STATE OF CALIFORNIA,

County of Los Angeles, ss:

On this 26th day of December in the year one thousand nine hundred and eleven before me, William H. Curran, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Catesby C. Thom, known to me to be the duly authorized Attorney in Fact of National Surety Company, and the same person whose name is subscribed to the within instrument as the Attorney in Fact of said Company, and the said Catesby C. Thom acknowledged to me that he subscribed the name of National Surety Company thereto as principal, and his own name as Attorney in Fact.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[SEAL.]

WILLIAM M. CURRAN,

*Notary Public in and for Los Angeles County,
State of California.*

(Endorsed.)

332 The within bond approved both as to form and amount
and sufficiency of surety, this 28th day of December, A.
D., 1911.

EDWARD KENT,
*Chief Justice of the Supreme Court of the
Territory of Arizona.*

And on the same day to-wit: the twenty-eighth day of December,
1911, came the appellant by its attorneys and filed in the clerk's
office of said court in said entitled cause their certain Assignment
of Errors in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA, Appellee.

Assignment of Errors.

Comes now the above named appellant, Grant Brothers Construc-
tion Company, a corporation, and comes also The United States
Fidelity and Guaranty Company of Baltimore, Maryland, a cor-
poration, and show that in the record, proceedings, decision, and
final judgment herein there is manifest error, and that the
333 Supreme Court of the Territory of Arizona erred in this,
to-wit:

First.

In refusing to sustain the First Assignment of Error, presented
by the appellant to the Supreme Court of the Territory of Arizona,
and urged by the appellant, as follows:

"First. The court erred in refusing the instruction requested by
the appellant:

You are instructed that W. W. Carney or C. F. Holler and Com-
pany were not such agents of the defendant as to make the defendant
liable in this action for the unlawful acts of said W. W. Carney or
C. F. Holler and Company, unless the defendant participated in,
assented to, or directed the commission of such unlawful acts of
said W. W. Carney or C. F. Holler and Company."

Second.

In refusing to sustain the Second Assignment of Error, presented
by the appellant to the Supreme Court of the Territory of Arizona,
and urged by the appellant, as follows:

"Second. The court erred in refusing the instruction requested by
the appellant:

You are instructed that if W. W. Carney was engaged by the defendant as a special agent only, for the purpose of employing laborers, then you are instructed that any one dealing with him or with his partners, employees, or agents, was put upon their guard as to the extent of his authority and was dealing with him at their own risk as to the extent of his authority. Third parties, in this case the Mexicans, could not rely upon the agent's assumption of authority, but are to be regarded as dealing with the agent only to the extent of his powers and must at their peril observe that the act done by the agent is legally identical with the act authorized by the principal, and in this case, if you find, from the evidence, that W. W. Carney had no authority from the defendant to engage or hire laborers, or to make any offers or promises of employment outside of the Territorial limits of the Territory of Arizona, and the defendant did not ratify any hiring of Mexicans outside of the Territorial limits, of said W. W. Carney, then your verdict must be for the defendant."

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Third.

In refusing to sustain the Third Assignment of Error, presented by the appellant to the Supreme Court of the Territory of Arizona, and urged by the appellant, as follows:

"Third. The court erred in refusing the instruction requested by the appellant:

You are instructed that, if you find, from the evidence, that the Mexicans were hired and employed in Nogales, Arizona, to work for the defendant, and after being so hired and employed in Nogales, Arizona, the expenses and transportation of such Mexicans were paid and caused to be paid and furnished by the defendant from Nogales, Arizona, to Naco, Arizona, although such trip was made over a line of railroad running through Mexico, still the prepayment of the transportation by the defendant from Nogales, Arizona, to Naco, Arizona, and the payment of the expenses of the Mexicans upon such trip, under such conditions, is not and was not a violation of the Immigration Laws."

Fourth.

In refusing to sustain the Fourth Assignment of Error, presented by the appellant to the Supreme Court of the Territory of Arizona, and urged by the appellant, as follows:

"Fourth. The court erred in refusing the instruction requested by the appellant:

You are instructed that if you find from the evidence that at the time the defendant employed W. W. Carney to secure laborers for it in its construction camp the defendant specially instructed said W. W. Carney not to hire or employ any laborers within Mexico nor to make any offers or promises of employment to any one within Mexico, then the law presumed that such instruction was given to said W. W. Carney in good faith, and was to be observed by said W. W. Carney."

Fifth.

In refusing to sustain the Fifth Assignment of Error, presented by the appellant to the Supreme Court of the Territory of Arizona, and urged by the appellant, as follows:

335 "Fifth. The court erred in refusing the instruction requested by the appellant:

You are instructed that the defendant could not ratify the unauthorized act of any one pretending to act as the agent of the defendant in the making of offers or promises of employment in Mexico to laborers, unless it had full knowledge of the fact that such offer or promise of employment had been made in Mexico."

Sixth.

In refusing to sustain the Sixth Assignment of Error, presented by the appellant to the Supreme Court of the Territory of Arizona, and urged by the appellant, as follows:

"Sixth. The court erred in refusing the instruction requested by the appellant:

The court instructs the jury that if the jury find a verdict in favor of the plaintiff and against the defendant corporation, such verdict cannot in this suit exceed the sum of one thousand dollars."

Seventh.

In refusing to sustain the Seventh Assignment of Error, presented by the appellant to the Supreme Court of the Territory of Arizona, and urged by the appellant, as follows:

"Seventh. The court erred in refusing the instruction requested by the appellant:

The court instructs the jury that in order to find any verdict in favor of the plaintiff and against the defendant, the jury must find that the defendant corporation knowingly assisted or knowingly encouraged or knowingly solicited the migration or importation of an alien contract laborer into the United States."

Eighth.

In refusing to sustain the Seventh A, Assignment of Error, presented by the appellant to the Supreme Court of the Territory of Arizona, and urged by the appellant, as follows:

336 "Seventh, a. The court erred in refusing the instruction requested by the appellant:

You are instructed that the acts of assistance alleged in the complaint to have been rendered by the defendant to the forty-five Mexicans mentioned in the complaint are that the defendant furnished or caused to be furnished conveyance and transportation to said Mexicans upon their trip from Hermosillo, State of Sonora, Mexico, into Naco, Arizona, and that it paid or caused to be paid the expenses of the said Mexicans of their trip from Hermosillo, State of Sonora, Mexico, into Naco, Arizona. No other acts of assistance are alleged and none others should be considered by you in

arriving at your verdict, and unless you find from the evidence that either one or both of these acts of assistance are proved to have been knowingly rendered by the defendant to the said Mexicans, then your verdict must be for the defendant."

Ninth.

In refusing to sustain the Tenth Assignment of Error, presented by the appellant to the Supreme Court of the Territory of Arizona, and urged by the appellant, as follows:

"Tenth. The court erred in instructing the jury:

I instruct you that if you are satisfied from the evidence that at the time alleged in the complaint one Benito Acuna was an alien and a resident of and being in the State of Sonora, in the United States of Mexico, and was by the defendant knowingly induced or solicited or caused to be induced or solicited to migrate from the United States of Mexico to the United States of America by offers or promises of employment as a laborer in or toward the construction of a certain railroad then under the charge or management of the said defendant as contractor for the construction of said railroad in the county of Cochise, Territory of Arizona, and that said Benito Acuna, upon said offers or promises of employment as aforesaid, migrated from the United States of Mexico to the United States of America at Naco, Cochise County, Arizona, on the 29th day of October, 1909, or that the said defendant, Grant Brothers Construction Company, knowingly assisted or encouraged or knowingly caused to be assisted or encouraged the importation and immigration of the said Benito Acuna into the United States or knowingly furnished conveyance or transportation, or knowingly caused to be furnished conveyance or transportation to the said Benito Acuna, or knowingly paid or

337 knowingly caused to be paid the expenses or any part thereof of the said Benito Acuna in traveling from Hermosillo, State of Sonora, in the United States of Mexico, into Naco, Cochise county, Territory of Arizona, in the United States of America, and that the said Benito Acuna at that time was an unskilled laborer, and not one of the classes of persons exempted by law from the application of the statute to which I have called your attention, then you should find for the Government and against the defendant, upon the first count of the complaint for the sum of one thousand dollars."

Tenth.

In refusing to sustain the Eleventh Assignment of Error, presented by the appellant to the Supreme Court of the Territory of Arizona, and urged by the appellant, as follows:

"Eleventh. The court erred in instructing the jury.

I instruct you, further, that the converse of that is true; that if the defendant did knowingly cause the transportation to be furnished to these people named in the complaint, and they were alien laborers, if you find them to be alien laborers, or requested Carney, either directly or indirectly, expressly or impliedly, to furnish the transportation and conveyance, then the allegations of the complaint in that respect would be satisfied."

Eleventh.

In refusing to sustain the Twelfth Assignment of Error, presented by the appellant to the Supreme Court of the Territory of Arizona, and urged by the appellant, as follows:

"Twelfth. The court erred in qualifying and modifying the instruction by charging:

That is to say, it was at all times proper to employ Mexican citizens who had come to this country not in violation of the immigration laws, who had come properly, and who had not come as the result of any promise or inducement or offer of employment."

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Twelfth.

In refusing to sustain the Thirteenth Assignment of Error, presented by the appellant to the Supreme Court of the Territory of Arizona, and urged by the appellant, as follows:

"Thirteenth. The court erred in instructing the jury:

All corporations necessarily act through their officers and agents. All acts performed by duly authorized agents of a corporation are binding upon a corporation. All acts done by agents or servants of corporations, even when without the apparent scope of the authority of such officers and agents, if ratified and acted upon by the corporation with knowledge that such officers, in performing such acts, did so without the direct authority of the corporation, are binding upon the corporation."

Thirteenth.

In refusing to sustain the Fourteenth Assignment of Error, presented by the appellant to the Supreme Court of the Territory of Arizona, and urged by the appellant, as follows:

"Fourteenth. The court erred in instructing the jury:

You will observe that the statute covering the case now before you for consideration makes it a necessary condition that the acts and things charged to have been done by the defendant herein must have been knowingly done by the defendant. The court instructs you, however, that the word 'knowingly' as it appears in the statute, is used in its ordinary sense, and it should by you be given the same interpretation that it receives in its ordinary acceptance."

Fourteenth.

In refusing to sustain the Fifteenth Assignment of Error, presented by the appellant to the Supreme Court of the Territory of Arizona, and urged by the appellant, that the court erred

339 in instructing the jury as follows:

"In this case it is not essential that the Government should bring positive evidence here to show, or to have somebody swear that the corporation itself, or acting through its president, vice-president or general manager, secretary, treasurer or board of directors, actually and personally took part in the offers, inducements and solicitations made to the persons named in the complaint

herein, or any of them, if you believe from the evidence that such inducements, offers and solicitations were made to the persons named in the complaint or any of them, nor is it necessary that it should be admitted by any of the officers or agents of the defendant corporation that they knew that any such offers, inducements or solicitations were made as charged in the complaint but it is incumbent upon the Government to prove, not only that the persons named in the complaint, or some of them, were alien laborers, and actually entered the United States of America from the United States of Mexico, as a result of the offers, inducements and solicitations so charged to have been made, but some circumstance which would warrant the inference that such corporation and its officers and authorized agents knowingly encouraged and permitted it to be done. In other words, if the Government proves facts and circumstances which clearly satisfy you that the corporation, through its officers and authorized agents knew that such offers, inducements and solicitations would likely be made, and encouraged and permitted the making thereof, knowing that such persons, or any of them, would likely be induced to come to the United States of America from the United States of Mexico, as a result of such offers, inducements and solicitations, then you could properly say that the defendant corporation knowingly made the offers, inducements and solicitations charged in the complaint, if you believe from the evidence that such offers, inducements and solicitations were so made and that the persons named in the complaint, or some of them, were alien laborers and came from the United States of Mexico to the United States of America, as a result of the making of such offers, inducements and solicitations."

Fifteenth.

In sustaining the ruling of the trial court overruling the objections of the appellant to the admission of immaterial, incompetent and irrelevant evidence, the rulings of the trial court, and
340 the substance of the evidence particularly complained of being the following:

1. Permitting the witnesses W. W. Carney, C. F. Holler, C. J. Ruppelius, Luis Sanchez and Ramon Felix to testify to the making of offers and promises of employment to Mexicans in Mexico and that such employment was to be obtained with the appellant in its construction camp, and permitting said witnesses to testify to acts of assistance and encouragement rendered by the witnesses to the Mexicans in their migration from the United States of Mexico into the United States of America.

2. Admitting in evidence a document marked "Plaintiff's Exhibit 1," the same being the minutes of the action of the Board of Special Inquiry in relation to the forty-five aliens named in the complaint, said minutes showing that at a meeting of said Board said forty-five aliens were, by the action of Board excluded from admission to the United States as alien contract laborers.

3. Admitting in evidence a document marked "Plaintiff's Ex-

hibit 2," the same being a pass issued by the Cananea, Yaqui River & Pacific Railroad to G. S. Randall from Naco to Nogales.

4. Admitting in evidence a document marked "Plaintiff's Exhibit 10," the same being a pass issued by the Cananea, Yaqui River & Pacific Railroad to G. S. Randall from Nogales to Naco.

341 5. Admitting in evidence a document marked "Plaintiff's Exhibit 11," the same being a pass issued by the Cananea, Yaqui River & Pacific Railroad to A. Castenada and 45 laborers from Hermosillo to Lomas.

Sixteenth.

In sustaining the ruling of the trial court over-ruling the motion made by the appellant at the close of all the evidence on behalf of the appellee to exclude the testimony of W. W. Carney, C. F. Holler, C. J. Ruppelius, Luis Sanchez and Ramon Felix, so far as the same related to the making of any offer or promise of employment by the appellant in Mexico, and so far as the same related to any act or acts in Mexico wherein they or either of them pretended to act for the appellant. Said witnesses having testified in substance that they made offers and promises of employment to Mexicans in Mexico and that such employment was to be obtained with the appellant in its construction camp. Said evidence was admitted by the trial court upon the avowal of the attorney for the appellee that he would thereafter show the witnesses' authority to act for the appellant in the making of the offers and promises; and said motion being made upon the ground that such authority had not been shown.

Seventeenth.

In refusing to sustain the Eighteenth Assignment of Error, presented by the appellant to the Supreme Court of the Territory of Arizona, and urged by the appellant, as follows:

342 "The evidence is insufficient to support either the verdict or the judgment, and they are both contrary to the evidence and contrary to the law as applicable to the facts disclosed by the evidence for the reason that there is no competent evidence tending to establish the appellant's connection with the unlawful acts of W. W. Carney and those acting under him, or that the appellant directed, assented to, acquiesced in, or ratified the unlawful acts as shown in the record of said W. W. Carney and those under him; but, on the contrary the evidence clearly established that such unlawful acts of W. W. Carney and those acting under him were committed contrary to and in violation of positive instructions of the appellant."

Eighteenth.

In sustaining the ruling of the trial court denying the motion of the appellant, made at the close of all the evidence for the appellee, for a directed verdict in favor of the appellant, for the reason that the appellee had failed to establish the allegations of its complaint, and had not shown that the appellant directed, assented to,

authorized or acquiesced in the unlawful acts of W. W. Carney, and of those acting under him, but on the contrary the evidence of the appellee showed that such unlawful acts of W. W. Carney had been expressly forbidden by the appellant, and that it had no knowledge that such acts were being committed by said Carney.

Nineteenth.

In sustaining the ruling of the trial court denying the motion of the appellant for a new trial made on the ground that the court admitted improper evidence at the trial for the appellee.

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Twentieth.

In sustaining the ruling of the trial court denying the motion of the appellant for a new trial made on the ground that the court erred in refusing instructions to the jury asked for by the appellant as shown herein in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Assignment- of Errors.

Twenty-first.

In sustaining the ruling of the trial court denying the motion of the appellant for a new trial made on the ground that the evidence does not sustain the verdict or judgment, and that they are both contrary to the evidence and the law applicable to the facts disclosed by the evidence, and that there was no competent evidence tending to establish the appellant's connection with the unlawful acts of W. W. Carney and those acting under him, or that the appellant directed, assented to, acquiesced in, or ratified the unlawful acts as shown in the record of said W. W. Carney and those acting under him; but, on the contrary, the evidence clearly established that such unlawful acts of W. W. Carney and those acting under him were committed contrary to and in violation of positive instructions of the appellant.

Twenty-second.

In sustaining the ruling of the trial court denying the motion of the appellant for a new trial made on the ground that the court erred in charging the jury as shown herein in the Ninth,
344 Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth Assignment- of Errors.

Twenty-third.

In sustaining the ruling of the trial court denying the motion of the appellant to suppress the depositions of Manuel Escabosa, Jesus Guevarra, Mateo Ortiz, Alberto Ruiz, Manuel Tona, and of Miguel Zazueta.

Twenty-fourth.

In sustaining the ruling of the trial court over-ruling the exceptions of the appellant to the appellee's bill of memorandum of costs,

and erred in sustaining judgment for costs in the sum of \$2,210.25 against the appellant.

Twenty-fifth.

The Supreme Court of the Territory of Arizona erred in affirming the judgment entered by the trial court against the appellant, and erred in entering judgment against the United States Fidelity and Guaranty Company of Baltimore, Maryland, and erred in failing to reverse the judgment entered herein by the trial court against the appellant.

Wherefore, and on account of said errors and each of them, all of which appear upon the record of said cause and in the decision and judgment of said Supreme Court of the Territory of Arizona, said Grant Brothers Construction Company, a corporation, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, pray that the judgment of the said Supreme Court of the Territory of Arizona in this cause may be reversed, and that
345 the Supreme Court of the Territory of Arizona be ordered to enter an order reversing the judgment of the trial court in said cause.

Phoenix, Arizona, December 28th, 1911.

A. C. BAKER,
ISIDORE B. DOCKWEILER,
A. B. BAKER,

*Attorneys for the Appellant and The
United States Fidelity and Guaranty
Company of Baltimore, Maryland,
a Corporation.*

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Clerk's Certificate.

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and Transcript of the Record in a certain cause lately pending in said court, No. 1173, wherein Grant Brothers Construction Company, a corporation, was appellant, and the United States of America, was appellee, including the Abstract of Record, Stipulation, Opinion, Judgment, Motion for Re-hearing, Petition for Writ of Error, Order for Writ of Error, Supersedeas Bond, Assignment of Errors, and all minute entries had and entered of record, as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Writ of Error and Citation are the originals issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 30 day of Jan'y, A. D., 1912, at Phoenix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court of Arizona.

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In the Supreme Court of the United States.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, and
The United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Writ of Error to the Supreme Court of the Territory of Arizona.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Supreme Court of the Territory of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment or decree, which is in the said Supreme Court of the Territory of Arizona, before you or some of you, between Grant Brothers Construction Company, a corporation, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, plaintiffs in error, and The United States of America, defendant in error, (a cause wherein a judgment was rendered against said plaintiffs in error for a sum in excess of Five Thousand Dollars, exclusive of costs, by the Supreme Court of the Territory of Arizona) a manifest error has happened, to the great damage of said plaintiffs in error, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and

348 full and speedy justice done to the parties aforesaid, in this behalf, do command you, that if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same in the said Supreme Court at Washington, District of Columbia, within Sixty (60) days from the date hereof; that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 28th day of December, in the year of our Lord, One Thousand Nine Hundred and Eleven.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,

Clerk of the Supreme Court of the Territory of Arizona.

Allowed by—

EDWARD KENT,

Chief Justice of the Supreme Court of the Territory of Arizona.

349 [Endorsed:] No. 1173. In the Supreme Court of the United States. Grant Brothers Construction Company, a corporation, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed Dec. 28, 1911. F. A. Tritle, Jr., Clerk.

350 In the Supreme Court of the United States.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, and
The United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the United States of America, Greetings:

You are hereby cited and admonished to be and appear at and before the Supreme Court of The United States at Washington, in the District of Columbia, within Sixty (60) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the Territory of Arizona wherein Grant Brothers Construction Company, a corporation, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, are plaintiffs in error, and you, The United States of America, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court of the United States, this the 28th
351 day of December, in the year of our Lord, One Thousand Nine Hundred and Eleven.

EDWARD KENT,

*Chief Justice of the Supreme Court of the
Territory of Arizona.*

Attest:

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,

*Clerk of the Supreme Court of the
Territory of Arizona.*

Due service of the foregoing citation, by copy, and also the writ of error mentioned therein is hereby acknowledged this 1st day of January, A. D. 1912.

J. E. MORRISON,

United States Attorneys for the Territory of Arizona.

352 [Endorsed:] Original. No. 1173. In the Supreme Court of the United States. Grant Brothers Construction Company, a corporation, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Citation. Filed Jan'y 4, 1912. F. A. Tritle, Jr., Clerk.

Endorsed on cover: File No. 23,043. Arizona Territory Supreme Court. Term No. 538. Grant Brothers Construction Company and The United States Fidelity and Guaranty Company of Baltimore, Maryland, plaintiffs in error, vs. The United States. Filed February 5th, 1912. File No. 23,043.

9
No. 182.

FILED
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JAMES D. MAHER
CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, A. D. 1913.

IN ERROR TO THE SUPREME COURT OF THE
TERRITORY OF ARIZONA.

Grant Brothers Construction Com-
pany, and the United States
Fidelity and Guaranty Company
of Baltimore, Maryland,

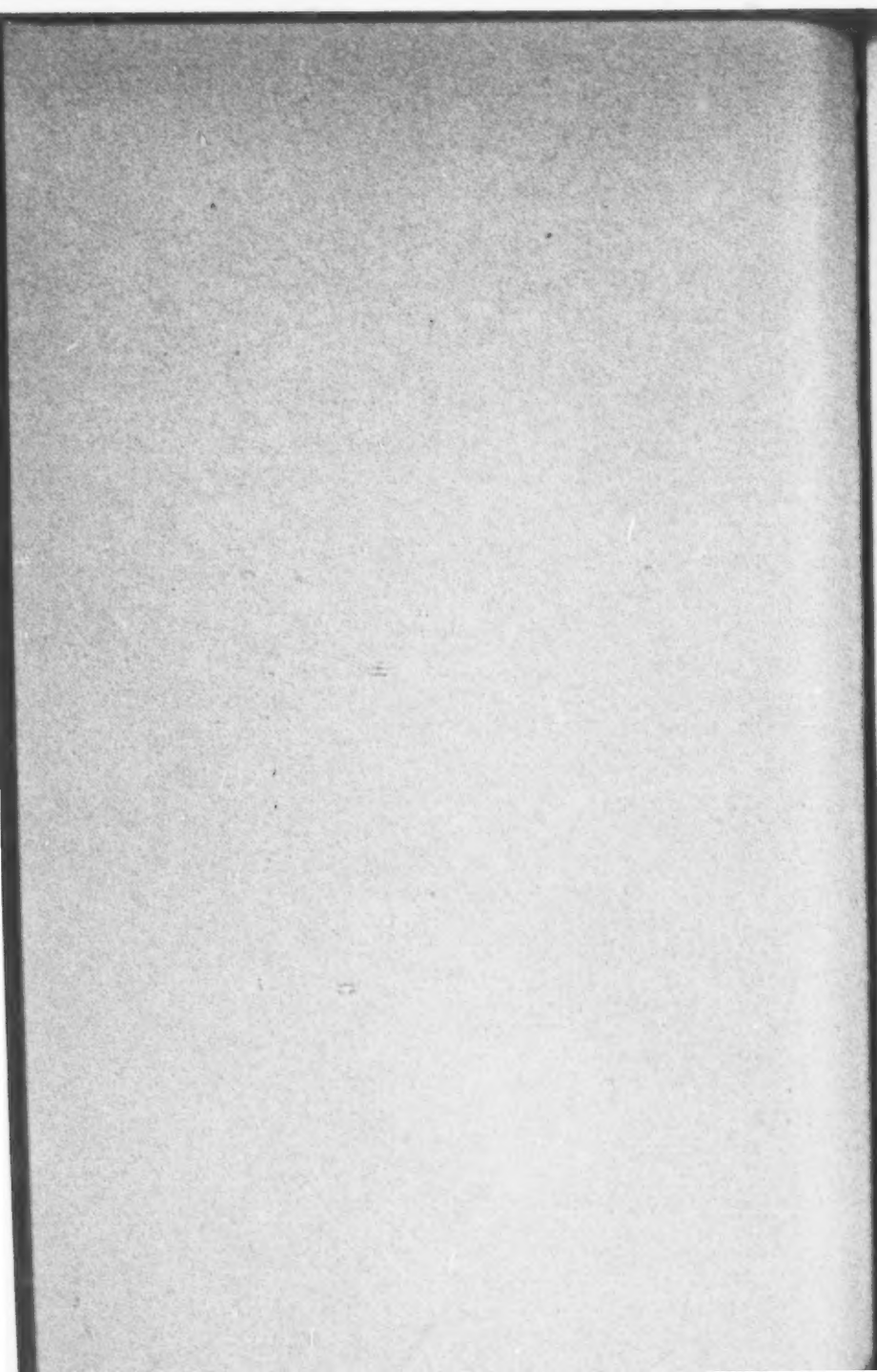
Plaintiffs in Error,

vs.

The United States.

Brief and Argument of Plaintiffs in Error.

A. C. BAKER,
ISIDORE B. DOCKWEILER,
Attorneys for Plaintiff in Error.
ROBERT B. MURPHEY,
Of Counsel.



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IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, A. D. 1913.

IN ERROR TO THE SUPREME COURT OF THE
TERRITORY OF ARIZONA.

**Grant Brothers Construction Com-
pany, and the United States
Fidelity and Guaranty Company
of Baltimore, Maryland,**

Plaintiffs in Error,

vs.

The United States.

Brief and Argument of Plaintiffs in Error.

STATEMENT OF THE CASE.

Plaintiffs in error seek to review and to reverse a judgment of the Supreme Court of the territory of Arizona [Trans. 147; 13 Arizona 388; 114 Pacific 955] which affirmed a judgment of the First Judicial District of the territory of Arizona in and for the county of Pima [Trans. 18], entered on a verdict of a jury awarding the sum of forty-five thousand (\$45,000.00) dollars

to defendant in error (plaintiff and appellee below) in an action brought against Grant Brothers Construction Company, a corporation, duly organized under the laws of California, and hereinafter referred to as the Construction Company, to recover a penalty under sections 2, 4, and 5 of the Act of Congress approved February 20th, 1907, entitled "An Act to Regulate the Immigration of Aliens into the United States," 34 Stat. 898; Fed. Stat. Ann. Supp. 1907, 96. That part of the statute under which this action was brought reads as follows:

"Sec. 4. That it shall be a *misdemeanor* for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisions contained in section two of this act."

"Sec. 5. That for every violation of any of the provisions of section four of this act, the person, partnership, company, or corporation violating the same, by *knowingly* assisting, encouraging or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus prom-

ised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

The complaint contains forty-five counts; the first count charges that in violation of the above statute, Grant Brothers Construction Company, a corporation, "on the 29th day of October, 1909, induced and solicited and caused to be induced and solicited one Benito Acuna, he then being an alien and resident of and being in the state of Sonora, in the United States of Mexico, to migrate from the United States of Mexico to the United States of America, (by offers and promises of employment) as a laborer in and towards the construction of a certain railroad then under the charge and management of the said Grant Brothers Construction Company, as contractor for the construction of said railroad in the county of Cochise, territory of Arizona, United States of America, and that said Benito Acuna, (upon said offers and promises of employment) as aforesaid migrated from the United States of Mexico to the United States of America, entering the United States of America at Naco, Cochise county, in the said territory of Arizona, on

the 29th day of October, 1909; and that said defendant, Grant Brothers Construction Company, assisted and encouraged and caused to be assisted and encouraged the importation and immigration of the said Benito Acuna into the United States, and furnished conveyance and transportation and caused to be furnished conveyance and transportation to said Benito Acuna, and paid and caused to be paid the expenses of his said trip from Hermosillo, state of Sonora, in the United States of Mexico, into Naco, Cochise county, territory of Arizona, in the United States of America; that said Benito Acuna, at all times herein mentioned was, and now is an unskilled laborer and not one of the classes of persons exempted under the last two provisos contained in section two of said Act of February 20, 1907." [Trans. pp. 1 and 2.]

It is to be noted that the complaint does not allege that any of the acts charged were "*knowingly*" done or that the Construction Company knew that such persons were "alien contract laborers." Such knowledge is an essential element of the Government's right to recover the penalty provided for in section five of the statute. This omission is fatal and it was error to affirm the judgment rendered on a verdict finding that allegations of such a defective complaint are true and which verdict does not include any finding of knowledge.

Counts two to forty-five inclusive, are identical in every respect with the first count, with the exception that the name of a different alleged alien is substituted in place of the name "Benito Acuna" in each count. In each count damages are prayed for in the sum of one thousand (\$1,000.00) dollars. The complaint concludes with a prayer for judgment against the defendant (plaintiff in error) in the sum of \$45,000.00.

The defendant entered a general demurrer and (in case the demurrer should be overruled), a general denial of each and every allegation contained in each and all of the forty-five counts of the complaint. [Trans. 4.] This demurrer was never waived or ruled upon, although it was called to the attention of the trial court at the opening of the trial. [Trans. 36.] The demurrer was not *argued* and the trial court therefore held the demurrer to have been waived, to which ruling the defendant duly excepted. [Trans. 36.]

FACTS.

The testimony is practically uncontradicted, and may be summarized as follows:

In August, 1909, plaintiff in error executed a contract with the Arizona and Colorado Railroad Company for the grading and construction of a certain railroad between Kelton, Arizona, and Naco, Arizona, both being in Cochise county

near the International boundary line between Arizona and Mexico. [Trans. pp. 71, 72.] This contract was introduced in evidence as defendant's exhibit "I." [Trans. p. 134.] About five thousand laborers were used in this work, up to November 1, 1909, coming from El Paso, Texas, Phoenix, Tucson, Bisbee, Nogales and other places in Arizona and New Mexico. [Trans. p. 116, fol. 252.] The contract with the railroad company provided that the railroad company should provide free of cost to the construction company "transportation for common laborers from points on lines owned or controlled by the Southern Pacific Company within the territories of Arizona and New Mexico to Kelton, Arizona, but will provide no return transportation for such employees." [Trans. p. 134.]

In the latter part of August, 1909, or the first part of September, 1909, the Construction Company entered into a contract with one W. W. Carney to furnish laborers to be employed by it for the construction of said railroad. This contract was oral and was made by Mr. Angus Cashion, assistant general manager of plaintiff in error, with said W. W. Carney at the Montezuma Hotel, in Nogales, Arizona, in the presence of Charles E. Pearce. [Trans. p. 115.] The testimony of all three, who were the only persons present, is entirely harmonious as to the substance of that conversation. [Trans. pp. 45-

58; 108-110; 115-117.] Carney approached Mr. Angus Cashion with a request to be allowed to supply some laborers to the Construction Company. [Trans. pp. 45, 108, 115.] Carney at that time was then and had been for five years forwarding agent of the Southern Pacific of Mexico Railroad, having his office in Sonora, Mexico, but resided in Nogales, Arizona. [Trans. p. 45.] Angus Cashion asked Carney where he expected to get laborers from [Trans. p. 115, fol. 251; p. 108, fol. 236], and Carney replied: "Right here in Nogales; there is a good deal of labor to be had here at all times." [Trans. p. 115, fol. 251; p. 55, fol. 119], enough to make it a good object to Carney. [Trans. p. 115, fol. 251.] Carney further stated that he expected to open employment offices in Nogales, Douglas and Naco, Arizona. [Trans. p. 55, fol. 119; p. 108, fol. 236.] All of these towns are border towns, and close to the work of the Construction Company then in progress aforesaid. Nogales, Arizona, has a population of about ten thousand (10,000) inhabitants [Trans. p. 110, fol. 239], and is considered a good labor market. There are at all times a number of Mexican laborers voluntarily coming across the International boundary line at Nogales, Naco and Douglas, Arizona, seeking employment. [Trans. p. 110, fol. 239.] Mr. Angus Cashion agreed to pay Carney one dollar for each laborer delivered at

the construction camps of the Construction Company, and twenty cents per meal for feeding the men en route, the Construction Company to furnish railroad transportation in ARIZONA from Nogales, Arizona, to its camps, [Trans. p. 45, fol. 96; p. 108, fol. 236-7]; Carney was to secure the men at his own expense [Trans. p. 55, fol. 119]; CARNEY WAS TO GET LABORERS ONLY WITHIN ARIZONA AND UNDER NO CIRCUMSTANCES TO HAVE ANYTHING TO DO WITH LABORERS IN MEXICO. These instructions as stated by Carney were as follows:

"You know the immigration laws. You know all these things, and whatever you do, you must get men on the American side, and not go into Mexico for men, nor do anything in any way which would complicate us in this matter—most positively." [Trans. p. 55, fol. 119.]

Cashion testified that he instructed Carney as follows:

"Under no conditions do you want to go into old Mexico and employ any labor; we don't want you to solicit or talk to a man on the Mexican side." [Trans. p. 109, fol. 236.]

Pearce, the only other person present, testified that Cashion instructed Carney:

"I want it distinctly understood that you confine yourself and your efforts entirely to the Arizona side—Nogales here." [Trans. p. 115, fol. 251.]

No evidence was introduced tending to show that these instructions were not given in good faith and with the intention that they should be strictly observed. Under the presumption of innocence existing in this case, they must, therefore, be deemed to have been given in absolute good faith.

Carney, unknown to any of the officers of the Construction Company, [Trans. p. 109, fol. 237; p. 111, fols. 241, 242; p. 113, fols. 246, 247; p. 114, fol. 248], went to C. F. Holler & Company, a co-partnership doing a brokerage business in Nogales, Arizona, composed of C. F. Holler and C. J. Ruppellius, with offices on the American side, and sub-contracted with them to secure the laborers, agreeing to pay them fifty cents for each laborer they delivered to the construction camps of plaintiff in error. [Trans. p. 47, fol. 100; p. 64, fol. 138.] This arrangement was made through C. J. Ruppellius, whom Carney informed fully as to *the instructions of the Construction Company, not to go into Mexico for any laborers, or have anything to do with laborers in Mexico, but to get men only on the American side.* [Trans. p. 67, fol. 146.]

On the 25th day of October, 1909, (four days prior to the date of the importation of the forty-five aliens mentioned in the complaint) Mr. James A. Cashion, vice-president and general manager of the work then going on in Arizona

of the Construction Company, upon learning for the first time that Carney had a contract to furnish laborers for the company, immediately asked Carney where he was getting laborers from, and Carney replied in Nogales, on the American side. Mr. Cashion then gave Carney the following instructions:

"We don't want you to get a man on the Mexican side; we don't want you to offer any inducements of any description, and I further instruct you not to even talk to any man regarding labor on the Mexican side." [Trans. p. 111, fol. 241.]

This testimony is not contradicted, and is corroborated by the testimony of John A. Burton, secretary of the company, [Trans. p. 113, fol. 246], and by J. E. McLean, [Trans. p. 114, fol. 249], and by Carney himself, [Trans. p. 56, fol. 120], they being all of the persons present at the conversation. The good faith of these instructions was not attacked, and there is no evidence in the record that the instructions were not given in good faith. On the contrary, the circumstances surrounding the giving of instructions indicate to the highest degree that the instructions were given in absolutely good faith.

Unredeemed Avowal of the United States Attorney.

Upon the avowal of the United States attorney that he would later show that the acts of Carney were authorized by, and known to, and

acquiesced in by the Construction Company, he was allowed to go into great detail to show the acts and declarations of Carney, and those acting under him in soliciting and inducing the migration of Mexican contract laborers to work on the railroad construction work of the Construction Company in Arizona. To each and all of this evidence, the Construction Company strenuously objected at the outset of and throughout the trial, as incompetent, irrelevant and immaterial, and not binding on the Construction Company in this action to recover a penalty for the commission of a crime, it not having been shown that the Construction Company had expressly, or impliedly, directly or indirectly, participated in or authorized, or directed, or knew of, or consented to the commission of any of said acts, or the making of any of said declarations. *The United States attorney totally failed to make good his avowal*, and at the close of the government's (defendant in error) case, therefore, a motion to strike out all of this evidence (so admitted upon avowal of counsel) was made, upon the grounds above stated, and in addition thereto, that *the evidence of the government* (defendant in error) *itself showed conclusively that such acts and declarations were not authorized by, consented to, or participated in, by the Construction Company.* The evidence so admitted upon avowal and included in the motion to strike

out we admit for the purposes of this brief tends to show that Carney and his subordinates (and not the Construction Company) committed acts in violation of the Immigration Act if there is sufficient proof that the persons named were *alien* laborers. In view of this admission, it is really unnecessary to here set forth those acts. We do so, even at the expense of unduly lengthening this statement of facts, in fairness to the Government for whatever relevancy or force they may have in showing the alleged implied authority of Carney and his subordinates from the Construction Company to commit the acts, or in showing that the Construction Company knew of the violation of the statute, and knowingly acquiesced therein

Acts of Carney, the Alleged Labor Agent, and his Subordinates.

On the 28th day of October, 1909, the forty-five alleged aliens mentioned in the complaint, were placed in a passenger coach at Hermosillo, Mexico, by C. J. Ruppellius, having been gathered together by Luis Sanchez and Ramon Felix, [Trans. 66, 67] who were hired by Ruppellius at the expense of the C. F. Holler Company, of which firm Ruppellius was a partner as heretofore stated and which firm was acting solely for Carney. [Trans. p. 67, fol. 45.] They were conveyed over the Sonora Railroad from Her-

mosillo, Mexico, to a little station called Lomas, Mexico, which is a few miles south of Nogales, Arizona, and is in the state of Sonora, Mexico, where they arrived on the same day. The record is silent as to who paid the transportation for these men from Hermosillo to Lomas, but shows they rode on a pass marked "account laborers" [Trans. p. 133]. Carney says that he did not pay it [Trans. p. 53, fol. 113]; Ruppellius says that he "went to the agent and told him that there was a car ready to go to Nogales. I am not sure whether I told him to telegraph W. W. Carney. I may have done so, however. I didn't know whether Mr. Carney had arranged for the transportation of these men. I am not sure whether I told the agent to wire W. W. Carney, but I was told by Mr. Carney to go to him and say: 'There is a carload with laborers, and they are ready to go.' All the acts I did and all the speeches and statements that I testified to, I only made under arrangement with Mr. Carney." [Trans. p. 67, fol. 145.] Holler testified that C. F. Holler & Company did not pay the transportation. *There is no evidence whatever that Grant Brothers Construction Company, either directly or indirectly, ever paid the transportation or arranged for it or procured the pass on which they rode.* The record is silent on this subject. Carney had no authority from the Construction Company to issue passes or arrange

for transportation in Mexico, [Trans. p. 57, fol. 122] and the Construction Company was allowed no transportation except in Arizona and New Mexico. [Trans. p. 68, fol. 134.] The auditor, J. C. Vinson, of the railroad company, a witness for the Government, testified it was never charged to or paid by Grant Brothers Construction Company, and that the said defendant company had no contracts in effect at that time entitling it to such a pass. [Trans. pp. 68, 69, 70, 71, 72, 73.] All the officers of the defendant company testified likewise. There is absolutely no evidence to the contrary. Under orders which Carney gave to the railroad dispatcher at Nogales, Sonora, Mexico, whose office was in the depot next to Carney's [Trans. p. 53, fol. 113], the car was set out at Lomas, and side-tracked there all the night of October 28th. During that evening, a man by the name of Gustavo S. Randall, and C. F. Holler, acting under the suggestion of W. W. Carney, proceeded to drive from Nogales, Arizona, to Lomas, Mexico, and furnished the men in the car with provisions, which were paid for by Carney and Holler, [Trans. p. 53, fol. 114], for which they were never reimbursed or promised reimbursement by Grant Brothers Construction Company. [Trans. pp. 54, 55.] On the night of the 28th, Carney and Holler employed Randall to take charge of a few men, about nineteen, [Trans. p. 54] all of whom had passed

through the immigration office at Nogales, Arizona, and also to take charge of the forty-five laborers in the car at Lomas, and to bring all of them to Naco, Arizona, the next day, to-wit, October 29th. Randall was to receive five dollars from Carney for this work. Carney never made any charge of this amount to Grant Brothers Construction Company. [Trans. p. 54, fol. 117.] He testified "My contract with Grant Brothers said that they would pay the expenses *in Arizona; they had nothing to do with Mexico.*" [Trans. p. 55, fol. 118.]

The Issuance of the Passes by W. W. Carney.

As heretofore stated, the Construction Company, by reason of its contract (defendant's exhibit No. 1 [Trans. p. 134], with the Arizona and Colorado Railroad Company, was entitled to free "transportation for common laborers from points on lines owned or controlled by the Southern Pacific Company within the territories of Arizona and New Mexico to Kelton, Arizona." It will, therefore, be seen that the appellant was entitled to free transportation of its laborers only in Arizona and New Mexico. [Deft's Exh. 1, Trans. p. 134.] Its arrangement with Carney for the shipping of laborers to its camp was based on this contract with the Arizona and Colorado Railroad. It was not entitled to receive free transportation in Mexico. J. J. Vinson, auditor

of the Arizona and Eastern, the Southern Pacific of Mexico, and the Sonora Railway, upon whose roads the passes were issued, testified with respect to the passes on which the forty-five laborers were carried:

"The contracts in effect at that time with Grant Brothers did not provide for furnishing of such pass as this." [Trans. p. 68, fol. 148.] "These passes were not issued by virtue of the contract of August 10th, 1909, between the Arizona and Colorado Railroad and the defendant." [Trans. p. 72, fol. 155.] "These passes which have been introduced in evidence were not charged on our books against Grant Brothers Construction Company, nor did they pay for them in any manner." [Trans. p. 72, fol. 156.]

How the passes came to be issued by Carney clearly appears from the evidence. He testified:

"At that time I was, and had been for five years, general forwarding agent for the Southern Pacific Railroad Company of Mexico. In that capacity, the company had furnished me with a book of passes, and this pass that was introduced in evidence here came to me from the Southern Pacific Railroad Company of Mexico under my arrangement with them. It did not at all come from the Grant Brothers Construction Company." [Trans. p. 55, fol. 119.] "The book of passes from which I took this pass in this case was one of the general Southern Pacific passes sent me for the furthering of the Southern Pacific Railroad Company's work in Mexico." [Trans. p. 56, fol. 120.] "No members of Grant Brothers Company ever told me to use those passes for those twenty-nine or forty-five men that went around to Naco, and I did not inform

any member of that firm at all that I was going to use those passes for that purpose, and no member of Grant Brothers Company knew that I was going to so use them." [Trans. p. 57, fol. 122.]

On the morning of the 29th of October, Carney, who was at that time general forwarding agent in the engineering department for the Southern Pacific Railroad of Mexico, and who in that capacity had been furnished by that railroad company with books of passes, for the speedy furthering of the Southern Pacific Railroad Company's work in Mexico, [Trans. p. 55, 56, fols. 119, 120], delivered to Randall, without any authority or knowledge of the railroad company or Grant Brothers Construction Company, [Trans. p. 55, 57], a pass for Randall and twenty-nine laborers from Nogales, Arizona, to Naco, Arizona, over the Cananea Rio Yaqui and Pacific Railroad, and a return pass for Randall alone. These two passes were attached to each other, and the return portion constitutes plaintiff's exhibit "2," and is substantially as follows: "Pass, G. S. Randall, from Naco to Nogales, account Grant Brothers Construction Company." [Trans. p. 129.] The going pass reads practically the same way.

On the morning of the 29th of October, the conductor of the regular train between Nogales and Del Rio, a station at which point this road joins with the railroad between Cananea and

Naco, received instructions from the chief dispatcher at Carney's request to pick up a car containing forty-five laborers in charge of Randall, at Lomas, and take it to Del Rio, and get a regular pass from Carney when he came back from Nogales. [Trans. p. 74, fol. 161.] This pass the conductor got from Carney the next morning, without any authority or knowledge of the Construction Company [Trans. p. 57, fol. 122], after he had returned to Nogales, and which pass he says he turned in to Mr. Vinson, the auditor of the railroad, with his report. Mr. Vinson testified that, after an extensive search of the records, papers and files of his office, he was unable to find this pass. [Trans. pp. 70, 71, fol. 153.] Mr. Carney instructed the chief dispatcher to send the above message to the conductor, as above indicated, as he, Carney, did not know how many men were in the car at Lomas, and that the conductor, on his return trip, should call at Carney's office and get transportation for the number of men actually in the car, which he did. [Trans. p. 54, fol. 116.] The car was picked up at Lomas, and taken to Del Rio, at which point it was turned over to Conductor Bennett, who caused the car to be attached to the regular afternoon train between Cananea, Mexico, and Naco, Arizona, and it was brought to Naco, Arizona, October 29th, 1909. [Trans., p. 75.] Conductor Bennett's report shows that

he carried the car, but his report and his memory absolutely fail to show by what authority or at whose expense he caused this car to be transported from Del Rio, Mexico, to Naco, Arizona. In like manner, the records in the office of the auditor, J. C. Vinson, wholly fail to disclose by what authority or at whose instance this car was so taken from Del Rio to Naco. [Trans., pp. 69-73.] There is no evidence in the record that the car was taken at the instance of, or under any authorization whatsoever from Grant Brothers Construction Company.

The car containing the forty-five laborers named in the complaint (together with the twenty-nine laborers going from Nogales, Arizona, through Mexico, to Naco, Arizona) was brought across the international boundary line into the United States, where the immigration officers found the men on the train, and took them to the immigration office.

On October 28th, Carney wrote and sent plaintiff's exhibit "7," which is a letter sent from Nogales, Arizona, informing the immigration office that he was sending eighty men from that point to Naco, who were to go to Grant Brothers Construction Company's camp to work. [Trans. p. 131.]

On the next day, he wired the immigration office at Naco, that there would be about sev-

enty Mexican laborers at Naco that day, for Grant Brothers.

On October 28th, Carney wrote plaintiff's exhibit "8" from Nogales, Arizona, enclosed in an envelope addressed to D. R. McDonald, or man in charge of wagon, Naco, Arizona. In this letter, Carney says in part:

"Kindly give the man in charge of the men a receipt for that he told to you there in Naco. Mr. James A. Cashion said he would get our receipts in Naco, and not when the men arrived at the various camps." [Trans. p. 132.]

D. R. McDonald, an old man employed by Grant Brothers as a roustabout to run errands [Trans. p. 48, fol. 103], on that day, had been sent by W. T. Taylor, general foreman of the construction camps, to Naco, with instructions to get a range or stove out of Cook's Warehouse, and ship it to one of the camps, and also to hire a team and go to Bisbee, Arizona, to look over some carts and harness. [Trans. pp. 117, 119.] Both Taylor and McDonald deny having any previous knowledge that any laborers would arrive at Naco. [Trans. p. 117, fol. 256; p. 119, fol. 259.] The letter was delivered to McDonald, who signed a receipt in his own name for seventeen laborers (who had passed through the immigration office and were not included among the forty-five laborers), as shown by plaintiff's exhibit "16." [Trans. p. 134.]

The forty-five laborers mentioned in the complaint, together with the bunch of seventeen or more laborers coming from Nogales, Arizona, were taken before a special board of inquiry of the immigration service, without notice or knowledge of the defendant company, for a hearing, to determine whether or not they were entitled to enter the United States, at which hearing, which was "separate and apart from the public," the order (plaintiff's exhibit "1") was made, and entered. [Trans. pp. 36-38.] Seventeen laborers were passed, none of them, however, being any of the forty-five named in the complaint. [Trans. p. 43, fol. 92; p. 59, fol. 128.]

The *ex parte* order of the board excluding said forty-five aliens from the United States as alien contract laborers, in which summary *ex parte* proceeding the defendant corporation was not present or represented, is the only evidence in the record that thirty-five out of the forty-five aliens named in the complaint were in fact aliens. The admission of this order, over our objection, is assigned and urged as error in this brief.

On October 26, 1909, Carney received defendant's exhibit "2" [Trans. p. 135], suggesting that instead of shipping the laborers north to Benson, thence over the main line of the Southern Pacific to Pearce, and thence south to the end of the line, all in Arizona, to ship them via Naco, Arizona, as it would be much

quicker and less expensive. Trans. pp. 57, 58, fols. 123-125.] This letter was written by Charles E. Pearce, whose sole duties were those of bookkeeper and paymaster for Grant Brothers Construction Company, without authority to hire or discharge laborers, who wrote the letter entirely of his own initiative, and without any authority from Grant Brothers Construction Company. [Trans. pp. 115, 116, 117.] He stated that the name of Grant Brothers Construction Company, as it appears on said exhibit, was placed there by him with a stamp in his custody; that Grant Brothers Construction Company had always recognized this stamp when used in the performance of his duties, but that this letter was not written in the performance of any of his duties. [Trans. p. 116, fol. 253.]

All of the officers of Grant Brothers Construction Company, to-wit: John A. Grant, president; James A. Cashion, vice-president and general manager; Angus Cashion, assistant general manager, and John A. Burton, secretary, testified to the *positive instruction to Carney, not to assist or encourage, or offer any inducements to Mexicans in Mexico, or even to talk to a man in Mexico regarding labor.* These instructions were given, as heretofore stated, at the time of the making of the contract with Carney, by Mr. Angus Cashion, to supply laborers for their construction camp, and also by Mr.

James A. Cashion, just a few days prior to the bringing by Carney and those acting under him of the forty-five laborers mentioned in the complaint, from Hermosillo, Mexico, to Naco, Arizona. None of the officers of the company had, prior to that time, ever been acquainted with, in any way, either C. F. Holler or C. J. Ruppellius, and none of them had any knowledge that Holler or Ruppellius, or anyone else were aiding Carney in securing laborers. [Trans, pp. 108-114.]

Carney Had No Implied Authority to Employ or Talk to Laborers in Mexico or to Assist or Solicit Their Migration.

Opposing counsel attempted to show implied authority of Carney and his subordinates to procure the forty-five laborers mentioned in the complaint, by evidence of a prior act of Carney and his subordinates in unlawfully procuring laborers from Mexico, to-wit, that prior to the arrival of the forty-five laborers mentioned in the complaint, C. J. Ruppellius, of Holler & Co., went to Hermosillo, Mexico, and got together a bunch of eighty or more aliens, telling them that work could be secured in Nogales by applying to C. F. Holler & Company, who would then send them to work out on the grades. Referring to this gang of eighty or more alleged alien laborers, the witness, C. J. Ruppellius, testified as follows:

"I told them, one or two of them, that if they were going to Nogales, to apply for a job with C. F. Holler & Company, and if there was a big crowd—not to go all together in a bunch to the office, for they had to pass or go through the immigration inspectors, something like that. After they got to Nogales and applied for a job, they were to get transportation from Nogales to the end of the track from Grant Brothers or from W. W. Carney. I am sure about that. I think I told them they would be sent by C. F. Holler & Company to work for Grant Brothers on the grade. * * * *I don't know what became of the ninety men.* They might have applied to C. F. Holler & Company and sent to Grant Brothers Construction Company. I think some of them applied, but I am not sure. We did not keep our eyes on them." [Trans. p. 65, fol. 140.]

As to the transportation of these ninety men, the witness, Ruppellius, of the firm of Holler & Co., stated:

"I don't know who furnished the transportation. I didn't pay it, in a way I arranged for it. I went to the agent, Monteverle, and told him that there was a bunch of Mexicans in the car, ready to go to Nogales, for the purpose of asking for work at Nogales, Arizona, from C. F. Holler & Co.

"If telling the agent that there was a bunch of men there to go to Nogales was the making of an arrangement for transportation, I did it. I knew the agent well. There was nothing in my conversation with him to indicate that I had any authority to direct him to put a car in the train and have it carried to Nogales. The car went on that kind of an arrangement. That was the way it happened." [Trans. p. 64, fol. 139.]

Ruppellius was at one time, prior to that time, agent for the railroad at Nogales. [Trans. p. 117, fol. 256.]

We submit that there is absolutely nothing in the record to indicate that the Construction Company prepaid, or arranged, in any way, either directly or indirectly, for this transportation, or that any of the officers of said corporation knew anything about these ninety alien laborers or their transportation. On the contrary, each and all of the officers of the company deny that such is the fact. [Trans. pp. 108-119.] The record is silent as to who paid this transportation. It was "not charged to the account of Grant Brothers Construction Company." [Trans. pp. 68-73.]

Position of Defendant Construction Company as to the Facts.

We admit, as heretofore stated, that the evidence tends to show that W. W. Carney, and C. F. Holler & Company, induced and solicited the Mexican laborers mentioned in the complaint to migrate into the United States, by offers and promises of employment, and that they furnished to them transportation from Hermosillo, Mexico, to Naco, Arizona, but do not admit that thirty-five of them were aliens. As we contend, the evidence further shows, without conflict, that their acts were not only unauthorized by, but in total disregard of, the positive *bona fide* instruc-

tions of, and without the knowledge or consent of, the Construction Company, and that, therefore, the Construction Company is not answerable criminally for their criminal acts; this is the principal question presented to this court affecting the merits of this action.

Failing to maintain its position in the trial court, the Construction Company prosecuted an appeal to the Supreme Court of the territory of Arizona, which, by its opinion [Trans. pp. 137-147], filed March 27th, 1911, affirmed the judgment of the trial court, entered its judgment [Trans. p. 147] against the Construction Company and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety upon the supersedeas bond given by the Construction Company upon its appeal pursuant to section 1592 Revised Statutes of Arizona of 1901. On November 10, 1911, the Territorial Supreme Court denied [Trans. p. 150] the motion for rehearing [Trans. p. 148] theretofore made by the Construction Company, which within sixty days thereafter, by the filing of a proper petition and supersedeas bond, obtained on December 28, 1911, a writ of error [Trans. pp. 150-155] from the chief justice of the Territorial Supreme Court. [Trans. p. 164.]

The record herein was filed in this court February 5th, 1912, pursuant to an act of congress admitting Arizona to statehood, and the errors asserted and intended to be here urged are as follows:

ASSIGNMENT OF ERRORS.

**The Supreme Court of the Territory of Arizona
Erred in the Following Particulars:**

Insufficiency of the Complaint.

In affirming the judgment entered by the trial court against the appellant, and erred in entering judgment against the United States Fidelity and Guaranty Company of Baltimore, Maryland, and erred in failing to reverse the judgment entered herein by the trial court against the appellant. [Twenty-fifth Assignment of Error, Trans. p. 125.]

Errors in the Admission of Evidence.

"In sustaining the ruling of the trial court overruling the objections of the appellant to the admission of immaterial, incompetent and irrelevant evidence, the rulings of the trial court, and the substance of the evidence particularly complained of, being the following:

1. Permitting the witnesses W. W. Carney, C. F. Holler, C. J. Ruppellius, Luis Sanchez and Ramon Felix to testify to the making of offers and promises of employment to Mexicans in Mexico and that such employment was to be obtained with the appellant in its construction camp, and permitting said witnesses to testify to acts of assistance and encouragement rendered by the witnesses to the Mexicans in their migration from the United States of Mexico into the United States of America.

2. Admitting in evidence a document marked "Plaintiff's Exhibit 1," the same being the minutes of the action of the board of special inquiry in relation to the forty-five aliens named in the complaint, said minutes showing that at a meeting of said board said forty-five aliens were, by the action of the board, excluded from admission to the United States as alien contract laborers.

3. Admitting in evidence a document marked "Plaintiff's Exhibit 2," the same being a pass issued by the Cananea, Yaqui River & Pacific Railroad to G. S. Randall from Naco to Nogales.

4. Admitting in evidence a document marked "Plaintiff's Exhibit 10," the same being a pass issued by the Cananea, Yaqui River & Pacific Railroad to G. S. Randall from Nogales to Naco.

5. Admitting in evidence a document marked "Plaintiff's Exhibit II," the same being a pass issued by the Cananea, Yaqui River & Pacific Railroad to A. Castenada and 45 laborers from Hermosillo to Lomas." [Fifteenth Assignment of Error, Trans. p. 161.]

"In sustaining the ruling of the trial court overruling the motion made by the appellant at the close of all the evidence on behalf of the appellee to exclude the testimony of W. W. Carney, C. F. Holler, C. J. Ruppellius, Luis Sanchez and Ramon Felix, so far as the same related to the making of any offer or promise of employment by the appellant in Mexico, and so far as the same related to any act or acts in Mexico wherein they or either of them pretended to act for the appellant. Said witnesses having testified in substance that they made offers and promises of employment to Mexicans in Mexico and that such employment was to be obtained with the appellant in its construction

camp. Said evidence was admitted by the trial court upon the avowal of the attorney for the appellee that he would thereafter show the witnesses' authority to act for the appellant in the making of the offers and promises; and said motion being made upon the ground that such authority had not been shown." [Sixteenth Assignment of Error, Trans. p. 161.]

"In sustaining the ruling of the trial court denying the motion of the appellant to suppress the depositions of Manuel Escabosa, Jesus Guevarra, Mateo Ortiz, Alberto Ruiz, Manuel Tona, and of Miguel Zazueta." [Twenty-third Assignment of Error, Trans. p. 162.]

Insufficiency of the Evidence.

In refusing to sustain the eighteenth assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, as follows:

"The evidence is insufficient to support either the verdict or the judgment, and they are both contrary to the evidence and contrary to the law as applicable to the facts disclosed by the evidence for the reason that there is no competent evidence tending to establish the appellant's connection with the unlawful acts of W. W. Carney and those acting under him, or that the appellant directed, assented to, acquiesced in, or ratified the unlawful acts as shown in the record of said W. W. Carney and those under him; but, on the contrary the evidence clearly established that such unlawful acts of W. W. Carney and those acting under him were committed contrary to and in violation of positive instructions of the appellant." [Seventeenth Assignment of Error, Trans. p. 161.]

"In sustaining the ruling of the trial court denying the motion of the appellant, made at the close of all the evidence for the appellee, for a directed verdict in favor of the appellant, for the reason that the appellee had failed to establish the allegations of its complaint, and had not shown that the appellant directed, assented to, authorized or acquiesced in the unlawful acts of W. W. Carney, and of those acting under him, but on the contrary the evidence of the appellee showed that such unlawful acts of W. W. Carney had been expressly forbidden by the appellant, and that it had no knowledge that such acts were being committed by said Carney." [Eighteenth Assignment of Error, Trans. p. 161.]

Errors in Instructions Given.

In refusing to sustain the tenth assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, as follows:

"Tenth. The court erred in instructing the jury:

I instruct you that if you are satisfied from the evidence that at the time alleged in the complaint one Benito Acuna was an alien and a resident of and being in the state of Sonora, in the United States of Mexico, and was by the defendant knowingly induced or solicited or caused to be induced or solicited to migrate from the United States of Mexico to the United States of America by offers or promises of employment as a laborer in or toward the construction of a certain railroad then under the charge or management of the said defendant as contractor for the construction of said railroad in the county of Cochise, territory of Arizona, and that said

Benito Acuna, upon said offers or promises of employment as aforesaid, migrated from the United States of Mexico to the United States of America at Naco, Cochise county, Arizona, on the 29th day of October, 1909, or that the said defendant, Grant Brothers Construction Company, knowingly assisted or encouraged or knowingly caused to be assisted or encouraged the importation and immigration of the said Benito Acuna into the United States or knowingly furnished conveyance or transportation, or knowingly caused to be furnished conveyance or transportation to the said Benito Acuna, or knowingly paid or knowingly caused to be paid the expenses or any part thereof of the said Benito Acuna in traveling from Hermosillo, state of Sonora, in the United States of Mexico, into Naco, Cochise county, territory of Arizona, in the United States of America, and that the said Benito Acuna at that time was an unskilled laborer, and not one of the classes of persons exempted by law from the application of the statute to which I have called your attention, then you should find for the government and against the defendant, upon the first count of the complaint for the sum of one thousand dollars." [Ninth Assignment of Error, Trans. p. 158.]

In refusing to sustain the eleventh assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, as follows:

"Eleventh. The court erred in instructing the jury:

I instruct you, further, that the converse of that is true; that if the defendant did knowingly

cause the transportation to be furnished to these people named in the complaint, and they were alien laborers, if you find them to be alien laborers, or requested Carney, either directly or indirectly, expressly or impliedly, to furnish the transportation and conveyance, then the allegations of the complaint in that respect would be satisfied." [Tenth Assignment of Error, Trans. p. 158.]

In refusing to sustain the fifteenth assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, that the court erred in instructing the jury as follows:

"In this case it is not essential that the government should bring positive evidence here to show, or to have somebody swear that the corporation itself, or acting through its president, vice-president or general manager, secretary, treasurer or board of directors, actually and personally took part in the offers, inducements and solicitations made to the persons named in the complaint herein, or any of them, if *you believe* from the evidence that such inducements, offers and solicitations were made to the persons named in the complaint or any of them, nor is it necessary that it should be admitted by any of the officers or agents of the defendant corporation that they knew that any such offers, inducements or solicitations were made as charged in the complaint but it is incumbent upon the government to prove, not only that the persons named in the complaint, or some of them, were alien laborers, and actually entered the United States of America from the United States of Mexico, as a result of the offers, inducements

and solicitations so charged to have been made, but some circumstance which would warrant the inference that such corporation and its officers and authorized agents knowingly encouraged and permitted it to be done. In other words, if the government proves facts and circumstances which clearly satisfy you that the corporation, through its officers and authorized agents knew that such offers, inducements and solicitations would likely be made, and encouraged and permitted the making thereof, knowing that such persons, or any of them, would likely be induced to come to the United States of America from the United States of Mexico, as a result of such offers, inducements and solicitations, then you could properly say that the defendant corporation knowingly made the offers, inducements and solicitations charged in the complaint, if you believe from the evidence that such offers, inducements and solicitations were so made and that the persons named in the complaint, or some of them, were alien laborers and came from the United States of Mexico to the United States of America, as a result of the making of such offers, inducements and solicitations." [Fourteenth Assignment of Error, Trans. p. 159.]

In refusing to sustain the twelfth assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, as follows:

"Twelfth. The court erred in qualifying and modifying the instruction by charging:

That is to say, it was at all times proper to employ Mexican citizens who had come to this country not in violation of the immigration laws, who had come properly, and who had not come

as the result of any promise or inducement or offer of employment." [Eleventh Assignment of Error, Trans. p. 159.]

In refusing to sustain the thirteenth assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, as follows:

"Thirteenth. The court erred in instructing the jury:

All corporations necessarily act through their officers and agents. All acts performed by duly authorized agents of a corporation are binding upon a corporation. All acts done by agents or servants of corporations, even when without the apparent scope of the authority of such officers and agents, if ratified and acted upon by the corporation with knowledge that such officers, in performing such acts, did so without the direct authority of the corporation, are binding upon the corporation." [Twelfth Assignment of Error, p. 159.]

In refusing to sustain the fourteenth assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, as follows:

"Fourteenth. The court erred in instructing the jury:

You will observe that the statute covering the case now before you for consideration makes it a necessary condition that the acts and things charged to have been done by the defendant herein must have been knowingly done by the defendant. The court instructs you, however, that

the word 'knowingly' as it appears in the statute, is used in its ordinary sense, and it should by you be given the same interpretation that it receives in its ordinary acceptation." [Thirteenth Assignment of Error, Trans. p. 159.]

Errors in Refusing Instructions.

In refusing to sustain the third assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, as follows:

"Third. The court erred in refusing the instruction requested by the appellant:

You are instructed that, if you find, from the evidence, that the Mexicans were hired and employed in Nogales, Arizona, to work for the defendant, and after being so hired and employed in Nogales, Arizona, the expenses and transportation of such Mexicans were paid and caused to be paid and furnished by the defendant from Nogales, Arizona, to Naco, Arizona, although such trip was made over a line of railroad running through Mexico, still the prepayment of the transportation by the defendant from Nogales, Arizona, to Naco, Arizona, and the payment of the expenses of the Mexicans upon such trip, under such conditions, is not and was not a violation of the immigration laws." [Third Assignment of Error, Trans. p. 156.]

In refusing to sustain the first assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, as follows:

"First. The court erred in refusing the instruction requested by the appellant:

You are instructed that W. W. Carney or C. F. Holler and Company were not such agents of the defendant as to make the defendant liable in this action for the unlawful acts of said W. W. Carney or C. F. Holler and Company, unless the defendant participated in, assented to, or directed the commission of such unlawful acts of said W. W. Carney or C. F. Holler and Company." [First Assignment of Error, Trans. p. 155.]

In refusing to sustain the fourth assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, as follows:

"Fourth: The court erred in refusing the instruction requested by the appellant:

You are instructed that if you find from the evidence that at the time the defendant employed W. W. Carney to secure laborers for it in its construction camp the defendant specially instructed said W. W. Carney not to hire or employ any laborers within Mexico nor to make any offers or promises of employment to anyone within Mexico, then the law presumed that such instruction was given to said W. W. Carney in good faith, and was to be observed by said W. W. Carney." [Fourth Assignment of Error, Trans. p. 156.]

In refusing to sustain the fifth assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, as follows:

"Fifth. The court erred in refusing the instruction requested by the appellant:

You are instructed that the defendant could not ratify the unauthorized act of anyone pretending to act as the agent of the defendant in the making of offers or promises of employment in Mexico to laborers, unless it had full knowledge of the fact that such offer or promise of employment had been made in Mexico." Fifth Assignment of Error, Trans. p. 157.]

In refusing to sustain the sixth assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, as follows:

"Sixth. The court erred in refusing the instruction requested by the appellant:

The court instructs the jury that if the jury find a verdict in favor of the plaintiff and against the defendant corporation, such verdict cannot in this suit exceed the sum of one thousand dollars." [Sixth Assignment of Error, Trans. p. 157.]

In refusing to sustain the seventh assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, as follows:

"Seventh. The court erred in refusing the instruction requested by the appellant:

The court instructs the jury that in order to find any verdict in favor of the plaintiff and against the defendant, the jury must find that the defendant corporation knowingly assisted or

knowingly encouraged or knowingly solicited the migration or importation of an alien contract laborer into the United States." [Seventh Assignment of Error, Trans. p. 157.]

In refusing to sustain the seventh a, assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant, as follows:

"Seventh, a. The court erred in refusing the instruction requested by the appellant:

You are instructed that the acts of assistance alleged in the complaint to have been rendered by the defendant to the forty-five Mexicans mentioned in the complaint are that the defendant furnished or caused to be furnished conveyance and transportation to said Mexicans upon their trip from Hermosillo, state of Sonora, Mexico, into Naco, Arizona, and that it paid or caused to be paid the expenses of the said Mexicans of their trip from Hermosillo, state of Sonora, Mexico, into Naco, Arizona. No other acts of assistance are alleged and none others should be considered by you in arriving at your verdict, and unless you find from the evidence that either one or both of these acts of assistance are proved to have been knowingly rendered by the defendant to the said Mexicans, then your verdict must be for the defendant." [Eighth Assignment of Error, Trans. p. 157.]

Errors in Denying Motion for New Trial.

In sustaining the ruling of the trial court in refusing to grant a new trial on the grounds that the court erred in admitting improper evidence, in refusing instructions to the jury requested by appellant, and in charging the jury, as shown by the first to eighteenth assignments of error herein. [Nineteenth to Twenty-second Assignments of Error, Trans. p. 162.]

Error in Overruling Exceptions to Costs.

In sustaining the ruling of the trial court overruling the exceptions of the appellant to the appellee's bill of memorandum of costs, and erred in sustaining judgment for costs in the sum of \$2,210.25 against the appellant. [Twenty-fourth Assignment of Error, Trans. p. 162.]

THIS CASE MUST BE REVERSED. THE DEFENDANT DID NOT HAVE A FAIR TRIAL IN THE LOWER COURT AND THE VERDICT AGAINST IT WAS WRONGFULLY OBTAINED. THE ERRORS ARE SO NUMEROUS AND SHOCKING IN CHARACTER THAT AT THE OUTSET FOR THE CONVENIENCE OF THE COURT WE ENUMERATE THOSE WHICH STAND OUT MOST GLARINGLY.

I.

Insufficiency of the Complaint.

A. *The complaint does not state facts sufficient to constitute a cause of action. "Knowledge" is an essential element and of the essence of the government's case. There is no allegation of knowledge to be found in the complaint. The demurrer thereto should have been sustained.*

B. *The verdict is based on a fatally defective complaint and contains no finding as to "knowledge," and is not sufficient to support the judgment.*

II.

Errors in the Admission of Evidence.

A. To prove that the forty-five laborers named in the complaint were each and all aliens the trial court over the defendant's objection as to its competency, admitted in evidence the order of the special board of inquiry consisting of three immigration inspectors, excluding said persons from the United States as "alien contract laborers." This was an *ex parte* proceeding, summary in character, "separate and apart from the public" at which the defendant company was not present or represented, and which the defendant was not even aware of till months later, the sole power of such board of inquiry being "to determine whether an alien who has been duly held shall be allowed to land or shall be deported." Without this order there is no evidence that thirty-five of the persons named in the complaint were aliens.

B. The lower court received in evidence the acts and declarations of certain persons and certain railroad passes without any evidence whatever that such acts or declarations or passes were authorized by the defendant, or that any of the officers of the defendant company were present when any of said declarations were made, or any of said passes were issued. Agency cannot be proven by the agent's own declarations.

C. The government's case was based largely on depositions taken *ex parte* at which the defendant company was not present or represented, and of the taking of which the defendant had no notice.

III.

Insufficiency of the Evidence as a Matter of Law.

A. There is no evidence as a matter of law that the defendant corporation knowingly participated in, aided, abetted, directed, authorized, acquiesced in, or had any knowledge whatever of the alleged unlawful acts of W. W. Carney and those acting under him, who were at best subordinate servants of defendant company, and incapable in themselves or of their own initiative of charging the defendant corporation criminally for their unauthorized unlawful acts. "Knowledge" is an essential element of the statutory offense.

B. There is no competent evidence as a matter of law that thirty-five out of the forty-five laborers named in the complaint were aliens. Proof of the alienage of each laborer was essential.

IV.

Instructions Erroneously Given and Refused.

A. The jury were instructed to find a verdict for the government if they were "satisfied from the evidence" or if they "believed from the evidence" that the defendant committed the offense charged. The jury should have been instructed that the government must prove the commission of the offense charged beyond a reasonable doubt, this being an action criminal in its nature for the recovery of a penalty imposed as a punishment for a criminal act.

B. The trial court instructed the jury that "all acts performed by duly authorized agents of a corporation are binding on the corporation." This is not the law in an action criminal in its nature if such agent is acting beyond the scope of his employment. [Trans. p. 159, fol. 338.]

C. The jury were authorized to find a verdict against the defendant company if it ratified the act of Carney in unlawfully importing the forty-five alleged aliens named in the complaint. A crime cannot be ratified so as to make the person ratifying such crime responsible for it.

D. The jury were instructed that any circumstance which would warrant the inference of knowledge of the defendant company was sufficient to authorize a finding of knowledge. [Trans. p. 160, fol. 339.] The jury should have

been instructed that only such circumstance is sufficient as would warrant the inference of knowledge beyond a reasonable doubt, this action being of a criminal nature.

E. The trial court refused to instruct the jury that neither *W. W. Carney* or *C. F. Holler & Company*, mere labor agents at best, were not such agents of the defendant as to make the defendant liable in this action for the unlawful acts of said *W. W. Carney* or *C. F. Holler & Company*. This instruction was proper, and was erroneously refused, for only the governing officers of a corporation can, of their own initiative, charge the corporation for criminal acts originated by them. Neither *Carney* nor *C. F. Holler & Company* were such governing officers.

F. The trial court refused to instruct the jury that if it found "from the evidence that *W. W. Carney* had no authority from the defendant to engage or hire laborers, or to make any offers or promises of employment outside of the territorial limits of the territory of Arizona, and the defendant did not ratify any hiring of Mexicans outside of the territorial limits of said *W. W. Carney*, then your verdict must be for the defendant." This instruction was proper, for the defendant corporation is not liable for the unlawful acts of *Carney*, unless it expressly

or impliedly authorized Carney to commit such acts. The defendant was entitled to have the jury so instructed.

G. The lower court refused to instruct the jury that it was not a violation of the immigration laws to lawfully employ laborers in Nogales, Arizona, and thereafter to prepay the expenses and transportation of such laborers from Nogales, Arizona, through Mexico, to Naco, Arizona. This instruction was proper and applicable to the evidence.

H. The court refused to instruct the jury that the instructions given by the defendant company to Carney not to hire or employ or even talk to laborers within Mexico were presumed by law to have been given in good faith, for the purposes of being observed by said W. W. Carney. There is absolutely no evidence in the record that such instructions were not given in good faith, and the defendant Construction Company was therefore entitled to have the jury instructed that the instructions to Carney were presumed to be given in good faith.

I. The trial court refused to instruct the jury that the unauthorized act of one pretending to act as the agent of the defendant in the making of offers of promises of employment in Mexico to laborers could not be ratified unless he had full knowledge of the fact that such offer or promise of employment had been made.

J. The court refused to instruct the jury that their verdict could not exceed the sum of one thousand (\$1,000.00) dollars. As the forty-five laborers named in the complaint were transported in one car, if the defendant was responsible for the same, there was only one illegal act, and not forty-five separate illegal acts.

I.

THE SUPREME COURT OF THE TERRITORY OF ARIZONA ERRED IN AFFIRMING THE JUDGMENT OF THE TRIAL COURT FOR THE REASON THAT THE COMPLAINT UPON WHICH THE JUDGMENT WAS BASED DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

This is covered by the twenty-fifth assignment of error, and is taken up first for the reason that the determination of this point in favor of plaintiff-in-error will render unnecessary a decision upon the other errors assigned.

Our contention on this phase of the case summarized is as follows:

(a) The statute imposing this heavy penalty is "highly penal and must be strictly construed" so as to bring within its condemnation only those who are shown by the direct and positive averments in the complaint to be embraced within the terms of the law.

U. S. v. Gay, 80 Fed. 254, 37 C. C. A. 46.

(b) *In order to incur the statutory penalty it is essential that the assistance, encouragement or solicitation to migrate to the United States be done knowingly, with knowledge that the person or persons so assisted, encouraged or solicited are alien contract laborers as defined by the statute.*

(c) None of the forty-five counts contain any allegation that the defendant knowingly assisted, encouraged, or solicited the migration to the United States of the person named in each count, or that the defendant knew, at the time, that any of such persons was an alien contract laborer, as defined by the statute.

(d) Failure to allege an element essential to incur the statutory penalty renders the complaint fatally defective, which can be taken advantage of at any time, and is not cured by verdict.

Therefore, a judgment based on a verdict which finds that the facts charged in such a fatally defective complaint are true, is not supported by the record, and the Supreme Court of Arizona erred in affirming the judgment of the trial court.

- A. The Statute Imposing this Penalty is Highly Penal and Must be Strictly Construed so as to Bring Within its Condemnation Only Those Who are Shown by Direct and Positive Averments in the Complaint to be Embraced Within the Terms of the Law.**

Section IV of the Immigration Act provides

“That it shall be a *misdemeanor* for any person, company, partnership or corporation in any manner whatsoever to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisions contained in section II of this act.”

Section V provides:

“That for every violation of any of the provisions of section IV of this act, the person, partnership, company or corporation violating the same by *knowingly* assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States, shall *forfeit and pay* for every such offense the sum of one thousand dollars,” etc. (Italics ours.)

Although this action is civil in form, it is in fact in the nature of a criminal proceeding in that it seeks to recover a penalty for the commission of a crime. “The law is highly penal and must be strictly construed.” (U. S. v. Edgar, 45 Fed. 46, 1 C. C. A. 52; U. S. v. M’Elroy, 115 U. S. 252.)

"The statute in question is highly penal, and must be so construed as to bring within its condemnation only those who are shown by the *direct and positive averments* in the declaration to be embraced within the terms of the law."

U. S. v. Gay, 95 Fed. 226 (C. C. A.).

The action above was civil in form to recover the statutory penalty.

In U. S. v. Tsokas, 163 Fed. 129, the court said:

"The use of the word 'misdemeanor,' however, in section 4, would seem to plainly indicate the intent of congress to treat a violation of the section as a criminal matter."

The Circuit Court of Appeals (Second Circuit) in *Regan v. United States* (183 Fed. 293, 105 C. C. A. 505), which was an action for the statutory penalty under the statute now under review, the court held that the *action was so much in the nature of a criminal proceeding that the guilt of the defendant must be proven beyond a reasonable doubt.*

This case, after being sent back for trial, was again appealed, and the government sought to make the Circuit Court of Appeals reverse its ruling on the previous appeal to the effect that the government must prove the defendant guilty beyond a reasonable doubt. But the court main-

tained the correctness of its former ruling. The court said:

"We remain of the opinion that under this act which makes the offense a misdemeanor, the government even when proceeding against the defendant for the penalty only must furnish the degree of proof required in a criminal case."

U. S. v. Regan (Feb. 10, 1913), 203 Fed. 433.

A civil action to recover a penalty for importing an alien into the United States in violation of the Immigration Act of 1885 (U. S. Comp. Stat. 1901, p. 1290) was brought in *Lees v. U. S.*, 150 U. S. 476, 37 L. Ed. 1150, 1151. In that case, the trial court compelled one of the defendants to testify for the United States and furnish evidence against himself. This court held that this was error, saying that

"This, though an action civil in form, is unquestionably *criminal in its nature*, and in such a case a witness cannot be compelled to be a witness against himself."

This case was distinguished, but not overruled, in *U. S. v. Hepner*, 213 U. S. 103, 53 L. Ed. 720, where, after quoting the above extract, Mr. Justice Harlan says:

"meaning thereby only that the action was of such a *criminal nature* as to prevent the use of depositions."

The Hepner case held that a civil action in debt was a proper proceeding to recover the penalty, and "restricting our decision to civil cases in which the testimony is undisputed," the court may legally direct a verdict.

The latest expression of this court construing sections 4 and 5 of the Immigration Act of 1907 is *United States v. Stevenson*, 215 U. S. 190, 54 L. Ed. 153, wherein Mr. Justice Day in rendering the opinion of the court says:

"It is undoubtedly true that a penalty of this character" (referring to the penalty provided in section 5) "in the absence of statutory provisions to the contrary may be enforced by criminal proceedings under an indictment."

The Immigration Act of 1903 (32 Stat. at L. 1213, Chap. 1012) was amended by the Act of 1907, now under consideration. The original act made it unlawful to assist or encourage the importation or migration of certain aliens into the United States. The amended act declares that such assistance, etc., shall be a misdemeanor. It is not to be presumed that this change is meaningless, and that congress had no purpose in making it. Nor can we perceive any purpose in making it except to manifest the intention of congress to make it *clear that acts denounced should constitute a crime* which would carry with it the right of the government to prosecute as for a crime.

That the statute is highly penal is shown also by the use of the words "*forfeit and pay*" the sum of \$1,000.00. If the statute were remedial only, the \$1,000.00 would be recovered only by the party aggrieved as *damages* by way of remedying the wrong done to such party. The distinction between remedial and penal statutes is pointed out in *Huntington v. Attrill*, 146 U. S. 657 (36:1123), and *Brady v. Daly*, 175 U. S. 153 (44:110).

B. In Order to Incur the Statutory Penalty it is Essential that the Acts of Assistance, Encouragement or Solicitation Must be Knowingly Done, With Knowledge that the Person Assisted, etc., is an Alien Contract Laborer as Defined by the Statute.

Section V expressly provides that the person or corporation violating Section IV "by *knowingly* assisting, encouraging or soliciting the migration or importation" of a "contract laborer" shall forfeit and pay \$1000. The term "contract laborer" is defined in Section II of the statute as "persons * * * who have been induced or solicited to migrate to this country by offers or promises of employment, or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled." The statute by the use of the word "*knowingly*" contemplates that the offending person, in order to incur the severe penalty

imposed, must with *knowledge* and with intent to evade the statute commit the acts of assistance, encouragement or solicitations charged to it, and also have *knowledge* that the persons so assisted, etc., were "persons who have been induced or solicited to migrate to this country by offers or promises of employment, or in consequence of agreements * * * to perform labor in this country." Congress by the use of the word *knowingly* shows that it did not intend that an *unwitting, innocent, ignorant* or *unconscious* assistance or encouragement, without knowledge that the person assisted was a "contract laborer," should be punished by the penalty.

The word "*knowingly*," when used in a statute, means *with knowledge of the facts subsequently stated*; in this case doing acts *with knowledge* of thereby assisting, encouraging or soliciting the migration or importation of a person then known to be an alien contract laborer, or as defined by section two, a person who has been "induced or solicited to migrate to this country" by offers, promises of employment or a completed contract of employment, in the United States.

Thus, in indictments, which are as strictly construed as the criminal statutes themselves, the use of the word "*knowingly*" supplies the place of a positive averment that the defendant *knew the facts subsequently stated*. Bishops New Crim. Law, Vol. II, paragraph 504; Dunbar v.

United States, 156 U. S. 185, 39 Law. Ed. 390; United States v. Scott, 74 Fed. 213; United States v. Mitchell, 141 Fed. 666; State v. Williams, 139 Ind. 43, 47 Am. St. Rep. 255; State v. Waterbury, 133 Ia. 137, 110 N. W. 328; State v. Root, 94 App. Div. 84, 87 N. Y. S. 962; Rex v. Lawley, 2 Stra. 904.

In State v. Williams (*supra*), the court said:

"We are satisfied both from the authorities cited and from the common and usual meaning given in the English language to the words 'knowingly' and 'well knowing' that either expression is equivalent to an allegation that appellee 'knew the facts subsequently stated'; that he 'knew what he was about to do, and with such knowledge proceeded to do the act charged.' To 'knowingly utter a forged instrument' is in truth the usual and ordinary form of expression, and fully avers the guilty knowledge that the instrument was forged."

"And to like effect are the authorities generally." Dunbar v. United States, 156 U. S. 185 (39:390).

"*Knowingly*" when applied to an act or thing done, imports *knowledge* of the act or thing so done, as well as an *evil intent* or bad purpose in doing such thing. See Rosen v. U. S. 161 U. S. 29, and Price v. U. S. 165, U. S. 311, both of which were prosecutions under U. S. Rev. Stat. paragraph 3893, making it criminal to "knowingly deposit" obscene or lewd matter in the mails.

In *Rosen v. U. S. (supra)*, the court said:

"Undoubtedly the mere depositing in the mail of a writing, paper or other publication of an obscene, lewd or lascivious character, is not an offense under the statute, if the person making the deposit was at the time and in good faith without knowledge, information or notice of its contents."

In *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314, the action was to recover a penalty for "*knowingly*" selling or delivering diluted milk, and the court said:

"But the word '*knowingly*' in the statute now under review, qualifies the act condemned and only makes the offense penal when committed by the authority of or with the knowledge or assent of the party sought to be charged. The act designedly distinguishes between actual and constructive participation in and assent to the wrongful act, and between actual or personal and imputed or constructive knowledge."

In *Driskill v. Parish*, 7 Fed. Cases, 1100, the Circuit Court of Ohio held (quoting from the syllabi):

"No one incurs the penalty under the act of congress (1 Stat. 302) for hindering or obstructing the arrest who does not act '*knowingly*.'"

In *Darnborough v. Joseph Benn & Sons*, (C. A.) 187 Fed. 580, the plaintiff brought an action to recover the penalty of \$1,000.00 pro-

vided for in the immigration act of 1903. The court said:

"The penalty is not attached to every violation of section 4 without qualification, but to every violation thereof 'by *knowingly* assisting, encouraging, or soliciting the migration of any alien to the United States, etc.' "

"Prepayment of an alien's transportation is one of the acts declared unlawful by section 4, but in and of itself is not one of the acts which incurs a penalty according to section 5. It incurs no penalty under section 5 unless it amounts to assistance, encouragement, or solicitation, *with knowledge*, and answering the description given in section 5."

In *U. S. v. Craig*, 28 Fed. 795, 799, the Circuit Court (E. D.) of Michigan had occasion to construe original immigration act enacted Feb. 26, 1885, of which the act of 1907 (under which the present action was brought) is amendatory. The third section of the act of 1885 provided:

"That for every violation of any of the provisions of section one of this act, the person, partnership, company or corporation violating the same by *knowingly* assisting, encouraging or soliciting the migration or importation of any alien or aliens, etc., to perform labor or service of any kind under contract or agreement, express or implied, * * * previous to becoming residents or citizens of the United States, shall forfeit and pay for every such offense the sum of one thousand dollars."

The act as amended in 1907 uses practically the same language except that it includes not only aliens under contract or agreement already executed, but also aliens "who have been induced or solicited to migrate to this country by *offers or promises of employment.*"

Mr. Justice Brown, then a judge of the District Court, construed the statute as follows:

"To give a right of action under this section three things are essential:

"(1) The immigrant must first, previous to his becoming a resident of the United States, have entered into a contract to perform labor or service here.

"(2) He must have actually migrated or entered into the United States in pursuance of such contract.

"(3) The defendant must have prepaid his transportation, or otherwise assisted, encouraged or solicited his migration *knowing that he (the alien) had entered into this illegal contract.*" (Italics ours.)

This construction of the statute was expressly approved in *United States v. Borneman*, 41 Fed. 751, where the court held that the omission to allege "that the defendant *knew*, when he assisted or encouraged the laborer to migrate, that he was under a contract to perform labor in the United States" was "fatal."

The case is cited with approval in *Lees v. United States*, 150 U. S. 476, 37 L. Ed. 1150.

In *Rex v. Hayes*, 23 Can. L. T. 88, 5 Ont. L. Rep. 198, it appeared that a Canadian statute similar to the U. S. immigration act under which this suit is brought, prohibited persons from "*knowingly*" importing aliens under contract to labor. The information failed to allege that the act was "*knowingly*" done, and was therefore held insufficient.

A statute of Rhode Island, (Pub. St. c. 247, paragraph 3), provided that it should be a criminal offense to "*knowingly*" harbor or release a person who has committed an offense with intent to aid in the escape of such person. This statute in *State v. Davis*, 14 R. I. 281, 284, was construed to mean that the person harboring the offender must have *knowledge* that the offense has been committed and also that the person so harbored had committed it.

"Knowledge—when an affirmative element in an offense must be expressly charged. To explain:

"A statute sometimes makes it punishable to do a thing 'knowingly' or 'knowing' a particular fact; so that the forbidden act to be *prima facie* criminal, must be accompanied by the knowledge, and this must be alleged.
* * * In substance—to repeat *any intent* which the statute, either by implication or expressly requires, must be averred * * * a rule believed to be without exception.
* * * Akin to or as a part of this doctrine, the evil intent must be joined in averment

to an act which, being in its nature innocent or indifferent, is by such intent made criminal." Bishops New Crim. Proc., Vol. II, paragraphs 523-525, and cases cited.

By using the word "*knowingly*," congress makes it clear that guilty knowledge or evil intent is an essential ingredient of the offense to be punished. It is a sacred principle of criminal jurisprudence that a guilty intent to commit the crime, *mens rea*, is of the essence of the crime, and to hold that a man shall be held criminally responsible for an offense of which he had no knowledge and did not aid, abet, or assent to, would be intolerable tyranny.⁸ This principle applies to statutory as well as common law offenses, unless the legislative branch has seen fit for reasons of public policy—such as police regulations, governing sale of liquor, etc., revenue and license laws—absolutely prohibited the doing of the act by anyone under any circumstances, knowingly or innocently. But whether or not the legislative branch so intended must clearly and fully appear from the statute, otherwise the statute will not be so construed. It does not ^{so} appear in the case at bar, but on the contrary, the act of congress provides that he only shall be punished who *knowingly* violates the act, evidencing the express will of congress that the liability under the statute shall be governed by the general rules of criminal responsibility wherein the intent of

the defendant in doing the act is an essential ingredient; that the specific intent to violate the statute (*mens rea*) must exist, (*Pettibone v. U. S.* 148 U. S. 209); that there must be a union of act and intent; that no one shall unwittingly, innocently or unconsciously incur its penalty.

So, illustrating this principle, the courts have held that "*knowingly*" when used in a statute imports that the offense must be committed with a guilty knowledge or evil intent, so that to render a person liable for *knowingly* doing a prohibited act, the act must have been done with an intent to evade the statute, or in other words, with a guilty or criminal intent, and not innocently or unwittingly.

U. S. v. Terry, 42 Fed. 317, 318, ("*knowingly and wilfully*" resisting an officer); *U. S. v. Kirby*, 7 Wall. 482, 74 U. S. 486, and *U. S. v. Claypool*, 14 Fed. 127, ("*knowingly and wilfully*" obstructing the passage of the mail); *Dunbar v. U. S.* 156 U. S. 185, 39 L. Ed. 390, ("*knowingly and wilfully*" smuggling goods); *U. S. v. Koplik*, 155 Fed. 919, ("*knowingly*" purchasing clothes from a soldier); *U. S. v. Highleyman*, 26 Fed. Cases, No. 15, 361, and *U. S. v. Janke*, 183 Fed. 277, ("*knowingly*" making false affidavit in naturalization proceedings); *Blakely First Natl. Bank v. Davis*, 135 Ga. 687, 70 S. E. 246), (*knowingly* taking usurious interest); *Robinson v. State*, 6 Ga. App. 696, 65 S. E. 792, (*know-*

ingly contracting bigamous marriage); State v. Bridgewater, 171 Ind. 1, 85 N. E. 715, (knowingly visiting gambling house); State v. Smith, 18 N. H. 91, (knowingly erasing voter's name from voting list); Verona Cent. Cheese Co. v. Murtaugh, 50 N. Y. 314, reversing on other grounds 4 Lans. 17, (knowingly supplying adulterated milk to cheese factory). In Gregory v. U. S. 17 Blatchf. 330, 10 Fed. Cas. No. 5, 803, under the federal statute (Rev. Stat. paragraph 3281, 3 Fed. St. Ann. 651), providing for the forfeiture of property, where a person "knowingly" suffers or permits his premises to be used for ingress or egress to an illegal distillery, it was held that to bring a person within the statute he must not only have permitted his premises to be used as a way of egress and ingress, but he must also have *known* that the place to and from whence ingress and egress was had was an illegal distillery.

"No principle of the common law is better settled or more generally applicable than the principle that an act is not a crime if the mind of the person is innocent."

Clark & Marshall, Crimes, paragraph 55.

"One is not usually said to permit an act he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge."

McDonald v. Williams, 174 U. S. 397,

“Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing but a determination with a bad intent to do it, or to omit doing it.”

Felton v. U. S., 96 U. S. 699, quoted and cited in Potter v. U. S., 155 U. S. 538, a prosecution for wilful over-certification, wherein the court said, page 446:

“It (wilful) implies on the part of the officers knowledge and a purpose to do wrong. Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law.”

In Yates v. Jones' Natl. Bank, 206 U. S. 158, an action for damages against the directors of a national bank for *knowingly* violating, or permitting the violation of the national banking act in the making and publishing of false reports by the officers of the bank, the court said, page 180:

“Where by law a responsibility is made to arise from the violation of a statute *knowingly*, proof of something more than negligence is required; that is, that the violation must in effect be *intentional*.”

In St. Louis & S. F. R. Co. v. U. S., 169 Fed. 69, an action to recover a penalty for a violation of an act of congress, it is said:

“The qualifying words cannot be disregarded. They mean something, and whatever that may be is an essential element of

the very right to the penalty. 'Knowingly' evidently means with a knowledge of the facts, which, taken together, constitute the failure to comply with the statute."

"'Knowingly' evidently means with a knowledge of the facts which, taken together, constitute a failure to comply with the statute, as is the case where one carrier receives from another a car loaded with cattle, and, with knowledge of how long they then had been confined in the car without rest, water or food, prolongs the confinement until the statutory limit is exceeded."

St. Joseph Stock Yards Co. v. United States. (three cases), 187 Fed. 104 (C. C. A.)

In that case the defendant had "no '*actual knowledge*' of the length of time they had been confined in the cars before it received and unloaded them, *and it did not make any effort to find out how long they had been confined.*" The court made no finding that the defendant had confined any of the cattle beyond the 28 hour limit fixed by the statute. So the Circuit Court of Appeal, Eighth Circuit, proceeds to say:

"It would be a travesty of justice to punish it for these acts, and these judgments must be reversed, and the cases must be remanded to the court below with instructions to render judgment for the defendant on the special findings of fact, on the ground that the latter fail to show that the defendant either 'knowingly' or 'wilfully' confined the cattle in violation of the statute."

Felton v. U. S., *supra*, (96 U. S. 699), was an action to recover a penalty for failing to comply with an act of congress relating to distillers of spirits. In addition to the paragraph previously quoted, the court further said, page 703:

“But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade the provisions, and the usual means to comply with them are adopted. All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of everybody.”

In U. S. v. Beatty, 24 Fed. Cases 14555, an action was brought to recover a penalty under an act of congress against the master of a vessel, for failure to deliver a letter. The letter was proved to have been in the possession of the clerk of the master, and it was contended that the clerk of the boat was the agent of the master, and the act of the clerk was the act of the master, on the maxim “*Qui facit per alium, facit per se.*” The court so instructed the jury, and this instruction was held error and a new trial ordered. The court said:

“The act is penal in its consequences, and must be strictly construed, and as knowledge is generally the principal and indispensable ingredient in offenses, it would seem reasonable to hold the government to proof of it, or to proof of circumstances from which it might be fairly inferred, before the penalty can be demanded. The knowledge on his part, express or implied, I regard as essential to his liability, and without which the

acts of congress have no application and do not embrace the case."

State v. McBarron, 66 N. J. L. 680. Indictment under statute for procuring the registration of a person as a qualified voter, knowing that such person is not entitled to vote. The court said:

"A conviction in this case cannot be sustained solely upon the fact that the plaintiff procured the name of an unqualified voter to be registered, but it must further appear that he knew when he caused such registration to be made that the person so registered was not entitled to vote at the next election; the significant word of the statute is 'knowing,' which means knowledge of, mental assurance, or scienter; it is positive, not negative. Such knowledge must be clearly proved or shown by such circumstances as leave no reasonable doubt on a fair mind; the proof of the knowledge must be clear, not a mere inference that he could have found out by further inquiry; there must have been culpable intent shown, not mere ignorance."

Utley v. Hill, 155 Mo. 232, 55 S. W. 1091, 78 Am. St. Rep. 569. Action by depositor against directors of a bank to recover losses sustained by the failure of the bank, under statute making directors liable for deposits received after insolvency. The court said:

"The constitution and the act require that, to subject a director or officer to the pain

and penalties denounced, 'he shall have knowledge of the fact that it is insolvent or in failing circumstances,' when he assented to the receipt of the deposit. The word 'knowledge' here employed must be taken in its common acceptation; that is, in the plain and ordinary meaning of the word. It ought to be so construed that no man who is innocent can be punished or endangered. So treated, we may properly look to the source to which men generally apply for the meaning of the word 'knowledge.' Webster's Dictionary defines 'knowledge': '1. The certain perception of truth; belief which amounts to, or results in, moral certainty. 5. Information; intelligence; as to have knowledge of a fact.' The knowledge which the law requires that a director shall have had means a guilty knowledge, not an innocent one, *bona fide*, ignorance arising from neglect to keep posted or to inquire. It must be construed to have been intended as a sword with which to punish the guilty, and a shield to protect the innocent. If this had not been the intention, the liability would have been made absolute and unqualified, instead of dependent upon knowledge."

"*Knowingly*" in a statute prohibiting an act or omission, refers to the state of mind of the accused, and implies guilty knowledge. *State v. Smith*, 119 Tenn. 521, 105 S. W. 68.

C. None of the Forty-five Counts of the Complaint Contain Any Allegation that the Defendant Knowingly Assisted, Encouraged or Solicited the Migration or Importation to the United States of the Person Named in Each Count, or that the Defendant Knew at the Time that Such Person was an "Alien Contract Laborer" as Defined by the Statute.

This is at once apparent upon the mere reading of the complaint. There is not a single word in any count of the complaint which, by the most strained construction, can convey to the human mind the idea that the defendant *knowingly* or with knowledge assisted, encouraged or solicited the importation or migration of any person into the United States, or that the defendant *knew* such person to be an "alien contract laborer," as that term is defined in section two of the statute, to-wit: An alien person who had "been induced or solicited to migrate to this country by offers or promises of employment, or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled."

The allegation of the complaint is that the defendant "induced and solicited and caused to be induced and solicited one Benito Acuna, he being then an alien and a resident of and being in the state of Sonora in the United States of Mexico, to migrate from the said United States of Mex-

ico to the United States of America (by offers and promises of employment) as a laborer," etc., and "*assisted and encouraged and caused to be assisted and encouraged* the importation and immigration of the said Benito Acuna into the United States, and furnished conveyance and transportation and caused to be furnished conveyance and transportation to said Benito Acuna, and paid and caused to be paid the expenses of his said trip," etc.

The truth of all these allegations may be assumed, and still the plaintiff would not be entitled to recover the statutory penalty, for consistent with these allegations, it may well be true that the defendant *innocently, unwittingly, or unconsciously* or by unauthorized acts of agents unknown to defendant, induced or solicited or assisted or encouraged the importation of said Benito Acuna or that defendant did not know that such person was an alien or that he had "been induced or solicited by offers or promises of employment" or in consequence of an agreement already made, to perform labor in the United States, in any of which events the penalty would not be incurred.

Mr. Chief Justice Fuller, in rendering the opinion of the court in *Pettibone v. United States* (148 U. S. 195, 37 L. Ed. 419, 422) says:

"The general rule in reference to indictments is that all the material facts and cir-

cumstances embraced in the definition of the offense must be stated, and that *if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication*. The charge must be made directly and not inferentially or by way of recital." (Italics ours.)

The same principle applies to a complaint to recover a statutory penalty for the commission of a crime. All the elements of the statute which are essential to create the right to recover the penalty must appear affirmatively by direct and positive averments in the complaint.

"The statute in question (sections 4 and 5 of immigration act) is *highly penal* and must be so construed as to bring within its condemnation only those who are shown *by direct and positive averments in the declaration* to be embraced within the law." United States v. Gay, 95 Fed., C. C. A. 226; see also to same effect Moffitt v. U. S., 128 Fed. 315.

This principle is so elemental that it needs no further citation of authorities to support it; but even at the expense of unduly lengthening this brief we will quote an extract from Ledbetter v. U. S., 170 U. S. 606, 42 L. Ed. 1162, wherein Mr. Justice Brown says:

"We have no disposition to qualify what has already been frequently decided by this court that where a crime is a statutory one, it must be charged with precision and certainty and every ingredient of which it is

composed must be clearly and accurately set forth," citing the following cases:

United States v. Cook, 84 U. S., 17 Wall.
168, 174 (21:538, 539);

United States v. Cruikshank, 92 U. S.
542, 558, (23:588, 593);

United States v. Carll, 105 U. S. 611,
(26:1135);

U. S. v. Simmons, 96 U. S. 360 (24:819);

United States v. Hess, 124 U. S. 483,
(31:516);

Pettibone v. United States, 148 U. S. 197,
(37:419);

Evans v. United States, 153 U. S. 584,
(38:831).

In an action to recover a penalty, "the pleadings are construed with the same strictness that indictments are. The facts constituting the gravamen of the action should be clearly and distinctly stated, in order that it may appear that the case is within the statute." (30 Cyc. 1152, and cases cited.)

"As to matters of substance, the rule is that the plaintiff's pleading must set forth with particularity every fact necessary to constitute the offense, according to the legal effect of the penal statute." (16 Encyc. Pleading & Practice, 274, and federal court cases there cited.)

"This court has frequently had occasion to hold that the accused is entitled to know

the nature and cause of the accusation against him, and the charge must be sufficiently definite to enable him to make his defense and avail himself of the record of conviction or acquittal for his protection against further prosecutions, and to inform the court of the facts charged, so that it may decide as to their sufficiency in law to support a conviction, if one be had, and the elements of the offense must be set forth in the indictment with reasonable particularity of time, place and circumstances." *Armour Packing Co. v. United States*, 209 U. S. 79, 52 L. Ed. 681.

D. Failure to Allege an Essential Element of a Statutory Offense is Fatal, Can be Taken Advantage of at Any Time, and is Not Cured by Verdict.

It is to be observed that the defendant corporation in the trial court filed a general demurrer. [Trans. p. 4.] This demurrer was called to the attention of the court at the opening of the trial. [Trans. p. 35.] Counsel did not argue it, but stated that it did not waive it. The court ruled that the demurrer would be deemed waived, to which ruling the defendant noted an exception. [Trans. p. 36, folio 75.]

The courts have held that a mere defect of form may be waived. In this case, however, the demurrer was on the ground of failure of the complaint to state a cause of action, which counsel expressly stated he did not waive, but de-

manded a ruling on it which the court improperly refused. This demurrer went to the substance of the right of recovery and was not waived by a failure to argue it. Supreme Lodge K. of P. v. McLennan, 171 Ill. 417, 49 N. E. 530, affirming 69 Ill. App. 599.

"It is the demurrer, and not the argument, which raises the issue of law, and the party cannot be deprived of his right to be heard upon it in this court because he saw fit to submit the demurrer without argument in the court below." (Richards v. Travelers' Ins. Co., 80 Cal. 505.)

In this case, however, the demurrer is general, and, as this ground is not one which is waived even by failure to demur, it is obvious that it was *not waived by consent that it be overruled*. Evans v. Gerken, 105 Cal. 311, 38 Pacific 725; see also in accord, Morris v. Courtney, 120 Cal. 63, 52 Pac. 129.

In U. S. v. Carll, 105 U. S. 611 (26 L. Ed. 1135), an indictment under section 5431 of the U. S. Revised Statutes, which failed to allege the defendant *knew* that the obligation charged to have been passed was false, forged, etc., was held to be fatally defective, for the reason that "*knowledge* that the instrument is forged and counterfeited is essential to make out the crime," and was not alleged. In this case the jury has been instructed by the lower court that in order to convict, they must find that the accused *knew*

the instrument to be forged. Mr. Justice Gray says:

"This indictment by omitting the allegation contained in the indictment in *U. S. v. Howell*, 11 Wall. 432, (78 U. S. XX 195), and in all approved precedents, that the defendant *knew* the instrument which he uttered to be false, forged and counterfeit, *fails to charge him with an offense*. The omission is a matter of substance, and not a 'defect or imperfection in matter of form only' within the meaning of section 1025 of the revised statutes." (Italics ours.)

In Bishop's New Crim. Procedure, Vol. I, paragraph 123, Sub. 3, it is said that

"Though formalities ordained for the ease or protection of the litigant may be waived, what is of the essence of a valid judgment cannot be. There can be no waiver, for example, if the declaration in a civil suit embodies no cause of action, (*Teal v. Walker*, 111 U. S. 242, 28 L. Ed. 416, 4 S. Ct. 420), or if the indictment in a criminal one charges no offense."

"It is but repetition to say there can be no waiver of what leaves the record destitute of parts essential to a judgment." Bishop,

paragraph 125.

The Supreme Court, in the case of *Teal v. Walker*, 111 U. S. 242 (28:415) cited by Mr. Bishop, says:

"When the declaration fails to state a cause of action and clearly shows that, upon the case as stated, the plaintiff cannot recover, and the demurrer of the defendant

thereto is overruled, he may answer upon leave and go to trial, without losing the right of having the judgment upon the verdict reviewed for the error in overruling the demurrer. *The error is not waived by answer, nor is it cured by verdict.* The question, therefore, whether the complaint in this case states facts sufficient to constitute a cause of action is open for review."

In *Kentucky Life Ins. Co. v. Hamilton*, 63 Fed. 93, (C. C. A.), Mr. Justice Lurton, then circuit judge, says:

"The failure to demur or move in arrest of judgment is perhaps not important, for if anything appears upon the record which would have been fatal upon a motion in arrest of judgment, that thing is equally fatal upon a writ of error. *Slacum v. Pomery*, 6 Crauch 221; *Bond v. Dustin*, 112 U. S. 609, 5 Sup. Ct. 296; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481."

In *Slacum v. Pomery*, cited above, Chief Justice Marshall, speaking for the court, said:

"It is not too late to allege as error in this court, a fault in the declaration which ought to have prevented a rendition of judgment in the court below."

"The court, at its option, may notice a plain error not assigned." (Rules of the Supreme Court of the United States promulgated Dec. 22, 1911, Rule 35, Subd. 1; Rule 21, Subd. 4.)

The failure of the complaint in this case to state a cause of action is a "plain error." but we

do not ask the court to invoke the above rule, unless it is improper to consider this point under the general assignment of error in affirming the judgment of the trial court. This judgment should not have been affirmed. The complaint failed to allege knowledge, an essential element of the offense; the verdict, based on this defective complaint, likewise fails to contain any finding of this essential element. Therefore the verdict is insufficient to sustain the judgment, and the judgment is erroneous.

THE SUPREME COURT OF THE TERRITORY OF ARIZONA ERRED IN SUSTAINING THE RULING OF THE TRIAL COURT OVERRULING THE OBJECTIONS OF THE DEFENDANT CONSTRUCTION COMPANY TO THE ADMISSION OF IMMATERIAL, INCOMPETENT AND IRRELEVANT EVIDENCE.

The substance of the rulings of the trial court relates to three subjects, as shown by the sub-heads numbered 1 to 5 in the fifteenth assignment of error in this court. [Trans. p. 160.] Also the ruling refusing to suppress certain depositions. [Trans. p. 162, fol. 344, 23rd assignment of error.] We shall, however, in this argument, change the order of their presentation by discussing the second sub-head first.

A. The Supreme Court of the Territory of Arizona Erred in Sustaining the Ruling of the Trial Court Admitting in Evidence the Minutes of the Board of Special Inquiry, in Relation to the Forty-five Laborers Named in the Complaint, Said Minutes Showing that at the Meeting of Said Board, Said Forty-five Laborers were, by the Action of Said Board, Excluded From Admission to the United States as Alien Contract Laborers.

I. THE RECORD, PURPOSES FOR WHICH OFFERED AND OBJECTIONS THERETO.

This record was offered "for the purpose of establishing that the persons examined at that time were held to be alien laborers, and that their status was thereby fixed, in such a manner that the record is evidence in this case, tending to establish that fact." [Trans. p. 36, fol. 76.]

The defendant construction company objected to the introduction of the document "on the ground that the same is incompetent, irrelevant and immaterial, no foundation laid therefor, and that the document offered is not the best evidence * * * also upon the ground that the same is not certified as required by law," * * * also that the "record doesn't determine the status of these parties."

The record was admitted over the objection of the defendant, to which the defendant duly excepted. [Trans. p. 37.]

The record read as follows:

"Board Member Jones: I move that the applicants before the board, namely: Benito Acuna, (and the others of the forty-five laborers named in the complaint), be each and all excluded from admission to the United States as alien contract laborers, in accordance with section 2 of the act approved February 20th, 1907.

"Board Member Lockwood: I second the motion.

"Chairman: I concur.

"Aliens notified of their exclusion and right of appeal, which right, after a consultation with the Mexican consul at Naco, Arizona, they waived. Case closed at 11:15 A. M.

"I hereby certify that the foregoing is a true copy of the minutes taken by me at this hearing.

"ALFRED E. BURNETT."

[Trans. p. 38.]

The court limited the purpose for which the jury could consider this evidence to proving "that the persons named in the order were aliens, that they were alien laborers." [Trans. p. 39, fol. 81.]

If this evidence was improperly admitted, then the record is devoid of any evidence whatsoever that thirty-five of the forty-five laborers named in the complaint were aliens.

2. HEARING OF BOARD OF SPECIAL INQUIRY A STAR CHAMBER PROCEEDING.

The board of special inquiry, which excluded the laborers named in the complaint from the United States, is appointed under the provisions of section 25 of the immigration act of 1907, and

consists "of three members, who shall be selected from such of the immigration officials in the service as the commissioner general of immigration, with the approval of the secretary of commerce and labor shall, from time to time, designate, as qualified to serve on such boards." The authority of such boards is solely "to determine whether an alien who has been duly held shall be allowed to land or shall be deported."

The defendant corporation was not a party to, or present, or represented at, and had no notice, of the ex parte hearing of the board of special inquiry, whose summary order the government seeks, in this case, to introduce against the defendant corporation. The statute provides that

*"all hearings before boards shall be separate and apart from the public, * * * and the decision of any two members of a board shall prevail."*

The rules and regulations of the department of commerce and labor provide that

"every alien who may not appear to be clearly and beyond a doubt entitled to land, shall be detained for examination by a board of special inquiry, which examination shall be promptly conducted, separate and apart from the public, and upon the conclusion thereof, the alien shall be either immediately landed or ordered excluded and returned to the country whence he came." (Rule 6.)

This rule also provides that if an alien elects to appeal from an adverse decision, he must do

so within forty-eight hours. Rule 7 provides that "on such appeal of any case to the secretary, no evidence will be considered which has not already been passed upon in said case by the board of special inquiry, at the original hearing, or upon the re-hearing, if so ordered."

As stated by Mr. Justice Brewer:

"Can anything be more harsh and arbitrary? Coming into a port of the United States, as these petitioners did in the Port of Malone, placed as they were in a house of detention, shut off from communication with friends and counsel, examined by the inspector, with no one to advise and counsel, only such witnesses present as the inspector may designate, and upon an adverse decision, compelled to give notice of appeal within two days, within three days the transcript forwarded to the commissioner general, and nothing to be considered by him except the testimony obtained in this STAR CHAMBER PROCEEDING."

(See opinion of Mr. Justice Brewer in U. S. v. Sing Tuck, 194 U. S. 161, 48 L. Ed. 917.)

3. ERRONEOUS VIEWS OF LOWER COURT AS TO
ADMISSIBILITY OF THIS ORDER.

The lower court in the case at bar, in approving the action of the trial court in admitting this evidence, said:

"We think the determination and decree of a competent tribunal of the government, established for the purpose of ascertaining the status

of the person applying for admission, as to whether he is an alien or not, is relevant and competent evidence of such a status. U. S. v. Hills (D. C.) 124 Fed. 831."

The case cited and relied upon by the territorial court is a district court decision. In that case, a motion was made to quash an indictment found by a grand jury accusing the defendant of a violation of section 11 of the Chinese exclusion act of 1882, as amended in 1884, upon the ground that the sole evidence before the *grand jury* tending to prove that the Chinese persons alleged to have been brought into the United States by the defendant were not entitled to enter or remain in the United States, was a judgment and decree of deportation, rendered by the United States commissioner, before whom the proceedings were instituted, and that such adjudication of the United States commissioner was not competent and relevant evidence *sufficient upon which to base the indictment*.

We submit that the case of U. S. v. Hills, relied on by the court, is not a valid authority in this case. In the first place, the United States commissioner, whose judgment was involved in that case, possesses judicial powers in respect to the particular matter, and is not merely an administrative officer; proceedings are initiated by proper complaint; issues are formed; he hears and determines the evidence; the parties before

him are litigants with opportunity to adduce evidence, examine and cross-examine witnesses, with right of representation by counsel; all proceedings are in public, not *ex parte* nor separate and apart from the public; his ultimate finding is a judicial determination of the issues presented and not a ministerial act of an executive officer. Does this equally hold true of the proceedings before a special board of inquiry under the immigration act? The duties of the immigration officers are administrative and executive. When an alien applies for admission, if the examining inspector entertains the least doubt as to the alien's right to enter, the alien "is detained for examination in relation thereto." (Section 24, act of February 20th, 1907.)

In *United States v. Hills* (*supra*) the defendant was charged with assisting the importation of a Chinese alien. Chinese are by the Chinese exclusion act placed in a class by themselves. In the absence of any evidence at all a Chinaman is presumed to have no right to enter or remain in the United States. This is not true of aliens of other nationalities who are not excluded except for causes which the government must affirmatively show. So in the *Hills* case the grand jury, in the absence of any evidence as to the alienage of the person assisted, could assume from the fact that he was of Chinese descent that he had no right to enter the United States.

In *Pearson v. Williams*, (202 U. S. 281, 50 L. Ed. 1029), this court, through Mr. Justice Holmes, decided that the functions of a board of special inquiry were not judicial, but were ministerial. We quote from the opinion:

"The board is *an instrument of the executive powers, not a court*. It is made up as we have mentioned of the immigrant officials in the service, subordinates of the commissioner of immigration, whose duties are declared to be administrative by Sec. 23. Decisions of a similar type have long been recognized as decisions of the executive department, and cannot constitute *res judicata* in a technical sense (citing many cases). The decisions necessarily are made, as we have said in a *summary way*, in order to reach the '*prompt determination*' declared by Sec. 25 to be an object. *The board has no power to compel witnesses to attend*, but, as was said by the Circuit Court of Appeal, *must decide on such evidence as is at hand or readily accessible*. These are considerations against the likelihood that congress meant such decisions to be binding upon the secretary of commerce and labor, the superior officer of members on the board."

In that case the aliens had been passed and admitted by the board of special inquiry. They were arrested later by order of the secretary of commerce and labor, and taken before the *same* persons constituting a board of inquiry, upon the same question, and were ordered excluded. The former order admitting the immigrants by the

same board was held to be of no force as against the government.

The board can not determine the status of persons as an alien, but only

“whether an alien who has been duly held shall be allowed to land, or shall be deported.”

The hearing of the board “shall be separate and apart from the public,” but the determination of the board is not final, even if not appealed from, but subject to collateral attack by the United States, if favorable to the alien. (*Lee Sing v. U. S.*, 180 U. S. 488.)

In short, in the case at bar, *the record of a secret star chamber meeting is brought forward to bind the defendant construction company, who was not a party to, present, nor represented at, and had no notice of such proceedings, and this though the United States would not even be bound thereby if adverse to it; as against the United States, the record, if adverse to it, would stand for naught. It has always been deemed sound: He that shall not be concluded by the record or other matter, shall not conclude another by it.*

In *Leggate v. Clark*, 112 Mass. 308, 310, the court excluded, as incompetent, an order of com-

mittal to an asylum, and we quote the following pertinent extract from the opinion:

“The order of the judge of probate was in a proceeding to which the tenant (here defendant) was not a party, and as to which he had no opportunity to be heard, and was upon an issue different from the issue on trial. The demandant contends that it is analogous to an inquisition of lunacy or a decree of a judge of probate, appointing a guardian of an insane person, and therefore admissible against strangers. But an inquisition of lunacy under the English system, and proceedings under our system, appointing a guardian of an insane person, are in the nature of proceedings *in rem*, and was designed to fix the status of the persons proceeded against. Under our system, careful provision is made for notice to the alleged insane person, and for a full hearing, and the decree fixes the status of the ward as an insane person ‘incapable of taking care of himself.’ * * * The necessary effect of the decree is that the ward is, in law, what the decree declares him to be, incapable of taking care of himself, as to all the world, otherwise the object of the statute would be entirely defeated. But an order under the statute of 1862, C. 223, Para. 3 (committing to an insane hospital), is not of this character. * * * It affords a justification for the restraint of his person, but is not designed to fix his status.”

The facts in *Leggate v. Clark* (*supra*) are exactly analogous, with respect to the admission of the order of commitment to the asylum, to the

facts of the present case, with respect to admitting the order of the board of special inquiry. In both cases, the order was introduced against a defendant who was not a party to such proceeding, "and as to which he had no opportunity to be heard, and upon an issue different from the issue on trial." The issue before the board of special inquiry was as to whether the laborers should be restrained from entering the United States. In the case at bar, one of the issues is the *status* of such laborers. It is absurd to contend that the proceedings of the board of special inquiry are proceedings *in rem*, or that such board had any jurisdiction to determine the status, as aliens, as against the world, of any of the forty-five laborers who were before it.

As pointed out by the court in *Leggate v. Clark*, in proceedings *in rem*, careful provision is made for notice, such notice generally being by extensive publication and posting, so that all persons concerned might have an opportunity to be heard. If such a board had the power to determine the status of a person, then its determination would be final and binding upon the courts of the United States, but the Supreme Court has held, in numerous cases, including the cases heretofore cited, that such determination is not final, but is subject to a collateral attack by the government. So it is apparent that the order of ex-

clusion by the board of special inquiry in the case at bar, cannot be admitted, on the theory that judgments and decrees of courts are admitted, for the defendant construction company was not a party to, or in privity with any party to such proceeding, and such proceeding cannot, therefore, be binding upon it.

The order of the special board of inquiry is not competent as a public record. It is in the same category as inquisitions of lunacy and coroner's verdicts as to the cause of death of deceased persons. In the following cases, the order of committal of persons to an asylum was *excluded* as incompetent:

Naanes v. State, 143 Ind. 299, 42 N. E. 609;

Dewey v. Algire, 37 Neb. 6, 9, 55 N. W. 276, (action by guardian to set aside a conveyance; commitment proceedings not admissible to show lunacy).

As to the competency of coroner's verdicts, they have been held to be *incompetent* in the following cases:

State v. Turner, Wright 20, (coroner's inquest not received against the accused);

Wheeler v. State, 34 Oh. St. 394, 398, (State v. Turner approved);

- Colquit v. State, 107 Tenn. 381, 64 S. W. 713, (murder; coroner's verdict as to cause of death held inadmissible in criminal cases);
- Memphis & C. R. Co. v. Wombach, 84 Ala. 149, 4 S. 618, (coroner's verdict not admitted to show that the deceased was "accidentally run over," etc.);
- Hollister v. Cordero, 76 Cal. 649, 18 Pac. 855, (inheritance of persons murdered, and the issue of survivorship; the coroner's verdict excluded);
- Rowe v. Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760, (coroner's verdict not admitted to show the cause of death);
- Germania L. Ins. Co. v. Ross-Lewin, 24 Colo. 43, 51 Pac. 488 (coroner's verdict not admitted to show suicide);
- Central Railroad v. Moore, 61 Ga. 151, 152, (death of a husband; "that there was a verdict at the inquest," excluded);
- State v. County Commissioners, 54 Md. 426, (death by wrongful act; coroner's verdict not received to show that the death was due to an unsafe crossing);
- Supreme Council v. Brashears, 89 Md. 624, 43 Atl. 866, (coroner's verdict not admitted to show suicide);

Wasey v. Insurance Co., 126 Mich. 188,
85 N. W. 459, (coroner's verdict not
admitted to prove suicide);

Cox v. Royal Tribe, 42 Ore. 365, 71 Pac.
73, (coroner's verdict not received to
show suicide).

In conclusion, the order of the board of special inquiry was *pure hearsay*. The board had no personal knowledge, and could have none, as to whether or not these men were American citizens or aliens. Its conclusion, summarily made, is based of necessity on meagre information, and at a secret star chamber proceeding, and which conclusion may be erroneous, and is not reliable. It is not like the statement of a public officer of the contents of a document in his custody of which he has *personal knowledge* nor is it like reports and maps of the U. S. land office used in establishing titles, which are made, not summarily, but after the most painstaking research and examination and are used in purely civil proceedings as shown by cases cited in U. S. v. Hills (*supra*). This proceeding, as heretofore pointed out, is of a criminal nature in punishment of a crime.

The testimony of all of the forty-five laborers was available to the government, and instead of producing or taking the depositions of only ten of them, the government should have de-

tained all of them as it had power and financial appropriation to do under Sec. 19 of the immigration act of 1907. The defendant did not have this power. It was helpless (when finding out months later of the acts charged) to look up these deported laborers who were probably by that time widely scattered. The burden of proof was on the government to prove the alienage of each laborer. It had the power and means under the statute to do so. Competent proof of alienage of each was essential. Surely the defendant ought not suffer for the government's negligence, nor can it be convicted and mulcted by a heavy penalty on incompetent evidence.

B. The Supreme Court of the Territory of Arizona Erred in Sustaining the Ruling of the Trial Court in Permitting the Witnesses W. W. Carney, C. F. Holler, C. J. Rupelius, Luis Sanchez and Ramon Felix to Testify to the Making of Offers and Promises of Employment to Mexicans in Mexico, and that Such Employment was to be obtained with the Defendant Construction Company in its Construction Camp, and Permitting said Witnesses to Testify to Acts of Assistance and Encouragement Rendered by the Witnesses to the Mexicans in their Migration from Mexico into the United States, and in Admitting the Passes Issued by Railroads in Mexico, as shown by Plaintiff's Exhibits "2", "10" and "11".

No rule of evidence is better established than that an agency or the extent of an agency, or the authority of an agent, cannot be proven by the acts and declarations of the person professing authority to act as such agent; nor are the acts and declarations of such a person admissible as admissions against the principal until the authority to bind the principal be shown. This rule is elementary and needs no citation of authorities, yet it was totally and wholly ignored in the trial of the case at bar.

U. S. v. Boyd, 5 How. 29, 12 L. Ed. 36.

Regan v. U. S., 183 Fed. 293 (C. C. A.), involved a prosecution under the act of

congress upon which this case is brought. In that case one Neuman was claimed by the government to have been the London agent of the defendant. Neuman induced the alien to migrate from London, England, to New York, and Neuman prepaid the passage of the alien. Neuman made declarations in writing that the defendant, Regan, had prepaid the alien's passage, which declaration was received in evidence. On this ground the Circuit Court of Appeals reversed the conviction. This decision applies with full force not only to the oral declarations pointed out, but also to the exhibits 5, 6 and 7, and especially to Burnett's testimony of Randall's admissions.

The fact that a person is acting with "apparent authority" from the principal is no exception to the rule. When the principal has knowledge of the exercising of certain powers by the alleged agent, and such knowledge is first shown, the principal's consent thereto by silence and acquiescent conduct is inferred by law, if any duty devolved upon him to speak, and the principal will not thereafter, as against third parties having relied and dealt with the agent upon such authority, be allowed to say that such person had no authority. The principal is bound, in such a case, on equitable grounds of estoppel, which form no part, and can have no place, in the

action of such a criminal nature as the case at bar.

Practically the bulk of the testimony of the government consists of the acts and declarations of Carney, C. F. Holler, C. J. Ruppelius of C. F. Holler & Co., Luis Sanchez and Ramon Felix, each and all of whom deny, as is elsewhere shown in this brief, any authority from the defendant construction company to do any of said acts or to make any of said declarations. These acts and declarations were admitted, upon the avowal of the United States attorney that he would later show that such acts and declarations were authorized by the defendant construction company, but, as is shown in Part III of this brief, the government totally failed, as a matter of law, to show any authority whatever in any of said witnesses, from the defendant construction company. Consequently, at the close of the government's case, the defendant moved to strike out all the testimony of said witnesses for said reasons, which motion was denied.

A. E. Burnett, United States immigration inspector at Naco, Arizona, was the first witness for the appellee. He was asked to state what one Gustavo S. Randall said and did at Naco at the time the forty-five Mexicans arrived there, it was objected to by the defendant, but admitted by the court upon the avowal of the attorney for the plaintiff that he would thereafter "connect

Gustavo S. Randall with Grant Brothers Construction Company as being in their employ," [Trans. pp. 39, 40, fols. 82, 85], and the witness testified at length to acts and declarations of Randall. W. W. Carney was then called by the plaintiff. He testified on direct examination to the agreement made by him with the defendant through Angus Cashion to furnish laborers to the defendant. [Trans. p. 45, fols. 95, 96.] Nothing had appeared indicating that the making of this agreement contemplated a violation of the law, the presumption, of course, was against such inference. He was asked to state his arrangement with Ruppelius and C. F. Holler and Company. It was objected to by the defendant, one of the reasons urged being that the agreement contemplated the personal services of Carney, that he could not delegate his authority and employ sub-agents. [Trans. p. 46, fol. 97.] The objection was overruled and the witness testified to the making of his agreement with Holler and Company. He next testified [Trans. p. 47, fol. 101], that the passes for the forty-five laborers were issued by him without authority, either from the defendant or from the Southern Pacific of Mexico, notwithstanding which the passes (plaintiff's exhibits 2, 10, and 11) were admitted. He testified further on direct examination [Trans. p. 54, 55, fols. 117, 118], that he had not expected to be reimbursed by the

defendant for any money paid out or expenses incurred in Mexico "because I had no contract to handle any men in Mexico, in Sonora," and "because my contract with Grant Brothers said that they would pay the expenses in Arizona, they had nothing to do with Mexico." On cross-examination he admitted having received the instructions from the defendant "not to even talk to a man in Mexico," [Trans. p. 55, fol. 119], and that the defendant knew nothing about his unlawful use of the passes. [Trans. p. 57, fol. 122.]

The order of proof is to a large extent within the discretion of the court, but this discretion relates only to the order of proof. The want of authority of Carney appeared from his own evidence, the witness of the plaintiff, thereafter it was no longer a question of order of proof, but one of substantive law. In the face of this evidence of want of authority of Carney, C. F. Holler and C. J. Ruppelius, composing the firm of Holler and Company, whose sole authority was derived through Carney [Trans. p. 60, fols. 129; p. 64, fol. 138], and could therefore have no greater power than Carney, were allowed to testify, over the defendant's objection, as to their unlawful acts and declarations, and this though Ruppelius admitted on cross-examination that Carney had at the outset stated to him that he had received instructions from the defendant "not to have anything to do with Mexicans in Mex-

ico, but only to get men on the American side.”
[Trans. pp. 67, 68, fols. 146, 147.]

Without the introduction of any evidence showing authority from the defendant to Carney, or of those under him, or evidence showing knowledge by the defendant of the unlawful acts, the evidence of Miguel Zazueta, Alberto Ruiz, Manuel Escabosa, Jesus Guevarra, Mateo Ortiz, Manuel Tona, Ramon Felix, Luis Sanchez, Francisco Norrales, Ricardo Lopez, Nicolas Casteneda, Abelardo Torres, Gumerillo Portillo, Gustavo S. Randall, and of others, were received over the objections of the defendant. Their evidence does not in the least point to the defendant, but that *Carney* said this, and Ruppelius that, that they were employed by Ruppelius, by Holler, by Randall, by Casteneda, by Sanchez, to work for the defendant on its grade is the constant refrain of this chorus of witnesses. Numerical strength in abundance, but mere number cannot supply strength inherently lacking. *They all must run to Carney for support*, upon him alone they must rest; he had previously denied them support, surely their evidence was not thereafter admissible against the appellant. The objections of the appellant thereto should have been sustained, and the motion of the defendant made at the close of the evidence of the appellee to strike out and exclude the evidence of certain

of these witnesses, [Trans. p. 105, fol. 229], should have been granted.

The argument against the admission of the oral evidence pointed out applies equally to the documentary evidence. The passes (plaintiff's exhibits 2 and 10), we have alluded to. Plaintiff's exhibits 5, 6, 7, 8 and 9, were statements and declarations of Carney and inadmissible, for if their tendency be considered as showing unlawful conduct on his part, it clearly appeared that such unlawful conduct was not authorized by the appellant. Exhibits 11, 12, 13, 14, and 15, only tended to show the transportation of the forty-five aliens from Hermosillo, Mexico, to Naco, Arizona, but did not tend to show the defendant's participation in such transportation and therefore inadmissible, especially so in view of the plaintiff's evidence that the appellant had no knowledge thereof.

G. The Supreme Court of the Territory of Arizona, Erred in Sustaining the Ruling of the Trial Court Denying the Motion of the Defendant Construction Company to Suppress Certain Depositions Taken Ex Parte by the Government without Notice. Furthermore, Being an Action for the Punishment of a Crime, the use of Depositions was Improper in that it Infringed on Defendant's Right to be Confronted by the Witnesses.

I. NO NOTICE WAS GIVEN THE DEFENDANT CONSTRUCTION COMPANY.

On April 22nd, 1910, notices were served upon the attorneys for the defendant Construction Company, that six days after the service of the notice and interrogatories attached, the plaintiff would apply to the clerk of the "above entitled court for the commission to take the depositions, etc." of six witnesses. [Trans. p. 5, fol. 9.] The notices are entitled "In the District Court of the *Second* Judicial District of the Territory of Arizona." The plaintiff, however, did not apply to the clerk of Second Judicial District as stated in the notice, but applied to the clerk of the *First* Judicial District, without any notice that it would apply to that court, unless the notice served for a different court at a different place can be considered as a notice.

The plaintiff seeks to excuse its action in not serving new notices upon the theory that on April

21st, 1910, the day previous to the service of the notice for the *Second* District, the venue of the case was by the action of the defendant, changed from the *Second* Judicial District, to the first judicial district, where the record of the case was filed on May 9th, 1910.

The defendant relying on the notice stating that the plaintiff would apply to the clerk of the *Second* Judicial District, did not appear at the end of the time stated or file any cross-interrogatories, for that court has lost jurisdiction and was without power to issue a commission to take

Prior to the trial the defendant served proper depositions in the case.

notice and motion to suppress the depositions, which were taken *ex parte* upon a commission issued out of the District Court of the *First* Judicial District, and returned to that court on May 20th, 1910. [Trans. pp. 3, 4, 6.] This motion is set out in full, with the grounds therefor in the Transcript. [Trans. p. 8.] The motion was overruled and the depositions read over our objections. [Trans. p. 76, fol. 165.]

Section 2507, Revised Statutes of Arizona (1901) the party applying for a commission to take depositions to serve and file "*a notice of his intention to apply for a commission.*"

It must be conceded, without argument, that a commission issued *without notice* having been

served is void, for without such, the clerk would have no authority to issue the commission, and the officer taking the depositions likewise did so without authority.

This court in *Harris v. Wall*, 7 How. (U. S.) 695, a notice to take depositions was objected to as insufficient, and this court said:

"It would be reasonable also, where notice is required to be given to the opposite party, that such notice should show upon its face that the contingency has happened which confers jurisdiction on the magistrates, and gives a right to the party to have the deposition taken, *so that the party to whom the notice is served, may be able to judge whether it is proper and necessary that he should attend.*"

If the defendant thought the notice for the Second Judicial District Court was "*bad*," its course was "to treat it as a *nullity*," which in fact it was, "and move to suppress the depositions, if taken." *Kline Bros. v. L. & L. and G. Ins. Co.* (Circuit Ct.), 184 Fed. 969. This the defendant did.

The defendant Construction Company relying on the plain and unambiguous notice served, "judged" that it was not "proper and necessary that he (it) should attend" by filing cross-interrogatories in a court which had no jurisdiction to issue the commission to be asked for. It judged correctly and should not be deprived of

its right to notice if the commission was to issue elsewhere from an entirely different court.

In *Knobe v. Williamson*, 17 Wall. 587, 21 L. Ed. 670, the United States Supreme Court said:

"A party who attempts to use a deposition of an absent witness must show that he has given his adversary an *opportunity to cross-examine by a notice that is definite and certain.*"

In *Buddicum v. Kirk*, 3 Cranch 293, 2 L. Ed. 444, it was held that depositions taken after an adjournment of a week, are not taken according to a notice that they will be taken upon a specified day, and, if not completed in one day, the commissioners will adjourn from day to day thereafter until finished. If that is true of such a notice in that case, the notice in this case has even less merit for a different place and court is applied to from that specified in the notice.

"The authority to take depositions in this manner, in derogation of the common law, has always been construed strictly, and therefore it is *necessary to establish that all the requisitions of the law have been complied with before such testimony is admissible.*"

Harris v. Wall (ante).

In accord are (among numerous other cases)

W. U. Tel. Co. v. Collins, 45 Kas. 94, 25 Pac. 187;

Garner v. Cutler, 28 Tex. 183.

A notice that a party will at a certain place and time take a deposition has been held insufficient to support a deposition taken at a different place, though next door on the same street.

Indiana Baptist Pub. Co. v. Ayer, 34 Ind.

App. 284, 72 N. E. 151.

We submit that the notice that plaintiff would apply to one court for a commission to take depositions is no notice that it will apply to an entirely different court at a different place. The defendant relied on the plain words of the notice served and were misled by it. We confidently submit *a notice for one forum is not any notice whatever for another and different forum.*

2. THE USE OF DEPOSITIONS IN THIS CASE TO RECOVER A PENALTY AS A PUNISHMENT FOR A CRIMINAL ACT WAS IMPROPER AND INFRINGED ON ITS CONSTITUTIONAL RIGHT TO BE CONFRONTED BY THE WITNESSES.

The penalty sued for herein could have been recovered by an indictment (*United States v. Stevenson*, 215 U. S., 54 L. Ed. 157). The statute expressly makes the offense a "misdemeanor." This court held in *Lees v. United States* (150 U. S. 476, 480, 37 L. Ed. 1150) that an action to recover the penalty provided for in the Immigration Act was of such a criminal nature that a defendant could not be compelled to testify for

the United States and furnish evidence against himself. *Boyd v. United States* (116 U. S. 616, 634, 39 L. Ed. 746, 752) holds that in such an action the defendant is protected by the 4th amendment "against unlawful searches and seizures."

In *Regan v. United States*, 183 Fed. 293, and *United States v. Regan*, 203 U. S., both decided by the Circuit Court of Appeals for the Second Circuit, it was held that in an action to recover the penalty sued for under the Immigration Act of 1907, now under review, that the government must prove the commission of the "misdemeanor" defined by the statute *beyond a reasonable doubt*. *Chaffee v. U. S.* (18 Wall. 518, 21 L. Ed. 908), and many other cases are cited and discussed. These views were reaffirmed upon the second appeal (203 Fed. 433). To the same effect holding proof should be beyond a reasonable doubt is *U. S. v. Shapleigh* (4 C. C. A. 237, 54 Fed. 126).

In *Huntington v. Attrill* (146 U. S. 1137, 36 L. Ed. 1123) the test as to whether a law is penal in its strict and primary sense is whether the wrong sought to be redressed is a wrong to the public or to the individual. A violation of the Immigration Act (Secs. 4 and 5) is a "misdemeanor" and a public and not a private wrong.

This court in *Hepner v. United States*, (213 U. S. 103, 53 L. Ed. 720) in referring to the cases of *Lees v. United States* (*ante*) said that this court meant "*thereby only that the action was of such a criminal nature as to prevent the use of depositions*" thereby establishing a different rule under this statute which expressly provides that the offense shall be a "misdemeanor," and the case of *United States v. Zucker* (161 U. S. 475, 40 L. Ed. 777) which was a "civil action to recover from the defendants a certain sum as the value of merchandise originally belonging to them and alleged to have been forfeited under the Customs Administrative Act of June 10th, 1890, 26 Stat. at L. 131," which statute is inherently different from the Immigration Act of 1907.

As to the criminal nature of such an action, see in addition to cases cited elsewhere in this brief *U. S. v. Choteau* (102 U. S. 611, 26 L. Ed. 246) and *Coffey v. U. S.* (116 U. S. 436, 29 L. Ed. 684) the latter case holding that an action to recover the penalty is a bar to an indictment for the same offense, and the former that the nature of the action as criminal is not changed by the form of the action by which the punishment is enforced. A corporation can only be punished by fine, or taking away its assets. Its assets are its very life blood.

3. THE DEFENDANT WAS PREJUDICED BY THE
ADMISSION OF THESE DEPOSITIONS.

Who can say what the jury relied upon in finding its verdict? The government deemed them of sufficient importance to take them and resist the motion to suppress them; they cannot now defend their course by saying the error was harmless.

Rulofson v. Billings, 140 Cal. 252, 74 Pac.

35.

Without the depositions there is no competent proof that the four witnesses whose depositions were taken were "aliens."

III.

THE SUPREME COURT OF THE TERRITORY OF ARIZONA ERRED IN SUSTAINING THE ACTION OF THE TRIAL COURT REFUSING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT CONSTRUCTION COMPANY, AND IN REFUSING TO SET ASIDE THE VERDICT IN FAVOR OF THE GOVERNMENT, SINCE A VERDICT WHICH INVOLVED A FINDING THAT THE DEFENDANT CONSTRUCTION COMPANY KNOWINGLY ASSISTED, ENCOURAGED OR SOLICITED, OR CAUSED TO BE ASSISTED, ENCOURAGED OR SOLICITED THE IMMIGRATION OR IMPORTATION OF ANY OF THE FORTY-FIVE LABORERS NAMED IN THE COMPLAINT, IS WITHOUT SUPPORT IN THE EVIDENCE.

The evidence is undisputed, and the government does not claim, nor could it, consistent with the evidence or consistent with any evidence in the record, claim that the defendant Construction Company, through the personal acts of any of its governing officers (whose acts and purposes alone can be said to connote corporate action or the corporate will), *participated* in any of the acts claimed by the government in this case to be in violation of the Immigration Act of 1907. *The evidence, so far from affording basis*

for such a claim, shows beyond a reasonable doubt without a scintilla of conflicting evidence, that not a single one of the governing officers of the Construction Company personally participated in any of the acts charged by the government to the defendant company.

Therefore, the necessary foundation of the claim of the government that the defendant Construction Company is responsible criminally in this action for the acts charged to it can only rest upon the theory that the acts for the commission of which the government seeks to recover the heavy penalty sued for in this action, were authorized, directed, knowingly assented to, or acquiesced in by the governing officers of the Construction Company. The evidence advanced in support of such a claim is so unsubstantial and so meagre that it cannot be said to come within the meaning of the expression "a scintilla of evidence."

The record not only does not contain any evidence in support of such a claim, but absolutely disproves it. Indeed, it proves beyond a reasonable doubt, that W. W. Carney, a subordinate labor agent at best, and who with his subordinates alone, as shown by the evidence, committed and were responsible for the acts charged to the defendant company, had been, by the positive, plain, and unequivocal instructions which were given in good faith, and which he fully under-

stood, commanded and expressly directed "*not even to talk to a man in Mexico,*" and "*under no conditions * * * to go into Old Mexico and employ any laborer.*"

Carney was again instructed, just a few days prior to the importation of the forty-five laborers complained of "not to get a man on the Mexican side; we don't want you to offer any inducements of any description; and I further instruct you not to even talk to a man regarding labor on the Mexican side."

Carney, who was the government's own witness, admitted that he had been so instructed at the time he was employed, and again so instructed by Mr. James A. Cashion, vice-president of the defendant Company. Carney's statement of these later instructions by Mr. James A. Cashion being as follows:

"Now, don't you do anything, by God, Carney, that you ought not to do. Don't go into Mexico for a single man."

A. A Directed Verdict is Proper Whenever The Court Would be Compelled to Set Aside Any Other Verdict as Being Without Support in the Evidence. An Inference from Circumstances Conflicting with all Reasonable Probabilities and Disproved by Facts Admitted or Established Beyond Dispute in the Case, Does Not Raise a Substantial Conflict of Evidence or Prevent the Direction of a Verdict or the Setting Aside of a Verdict.

The error of the court in refusing to direct a verdict in favor of the defendant Construction Company is raised by the eighteenth assignment of error, which is as follows:

"In sustaining the ruling of the trial court denying the motion of the appellant, made at the close of all of the evidence for the appellee, for a directed verdict in favor of the appellant, for the reason that the appellee had failed to establish the allegations of its complaint and had not shown that the appellant directed, assented to, authorized or acquiesced in the unlawful acts of W. W. Carney and those acting under him, but on the contrary, the evidence of the appellee showed that such unlawful acts of W. W. Carney had been expressly forbidden by the appellant, and that it had no knowledge that such acts were being committed by said Carney." [Trans. p. 161, fol. 342.]

The error of the court in refusing to set aside the verdict of the jury in favor of the government is contained in the seventeenth assignment of error, which reads:

"In refusing to sustain the eighteen assignment of error, presented by the appellant to the Supreme Court of the territory of Arizona, and urged by the appellant as follows: 'The evidence is insufficient to support either the verdict or the judgment, and they are both contrary to the evidence and contrary to the law, as applicable to the facts disclosed by the evidence, for the reason that there is no competent evidence containing or establishing the appellant's connection with the unlawful acts of W. W. Carney and those acting under him, or that the appellant directed, assented to, acquiesced in or ratified the unlawful acts, as shown in the record, of said W. W. Carney and those under him; but on the contrary, the evidence clearly established that such unlawful acts of W. W. Carney and those acting under him were committed contrary, to, and in violation of, positive instructions of the appellant.' " [Trans. p. 161, fol. 342.]

It is at once apparent that, in substance, the error in refusing to direct a verdict for the defendant company is the same as the error in refusing to set aside the verdict in favor of the government, and that both errors are based on the same reasons, the only difference being that the motion to direct a verdict was made at the close of the testimony for the government, and before the defendant Construction Company had offered any evidence in defense, and consequently, is based only on the evidence offered by the government, while the error of the court in refusing to set aside the verdict in favor of the government is based upon all the evidence in the

record, both that offered by the government and that offered by the Construction Company in defense. Bearing this in mind, we shall, in order to make this brief as short as possible, discuss both errors together.

- I. THE LAW IS SETTLED THAT A TRIAL COURT MAY DIRECT A VERDICT FOR ONE PARTY TO AN ACTION WHENEVER, UPON ALL THE EVIDENCE, A CONTRARY VERDICT, IF RENDERED BY THE JURY, WOULD HAVE TO BE SET ASIDE AS UNJUSTIFIED AND UNSUPPORTED BY THE EVIDENCE.

What is known as the "scintilla doctrine" no longer obtains.

Ryder v. Wombwell, L. R. 4 Exch. 39.

"Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to-wit: that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally *no* evidence, but whether there is any upon which a jury can *properly* proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

Giblin v. McMullen, L. R., 2 P. C. Apps.

335;

Improvement Co. v. Munson, 14 Wall.

448 (81 U. S. XXII, 782);

Parks v. Ross, 11 How. 373;
Merch. Bk. v. State Bk., 10 Wall. 637 (77
U. S. XIX, 1015);
Hickman v. Jones, 9 Wall. 201 (76 U. S.
XIX, 553)."

"Courts are not instituted to enable parties who have neither a wrong to redress nor a right to enforce to persist in a groundless suit, resting on the chances which arise from prejudice which sometimes influences juries. Where, after a case is all in, the court can see that no other evidence favorable to one of the parties is likely to be discovered or produced, and that upon all the evidence given a verdict in his favor would be altogether unjustifiable, and if rendered must be set aside on motion, and that the continuance of the litigation will probably produce no other result than injury to the party who is in the right, it is its duty to end the case by directing a proper verdict."

Estate of Morey, 147 Cal. 495.

Further quotation from the cases is, we believe, unnecessary. The rule is settled that in any case where a verdict for one of the parties must have been set aside, as being without meritorious support in the evidence, it is proper for the trial court to direct a verdict.

2. WHERE BUT ONE REASONABLE INFERENCE OR CONCLUSION CAN BE DRAWN FROM THE EVIDENCE, IT IS THE DUTY OF THE TRIAL COURT TO DIRECT A VERDICT OR SET ASIDE A VERDICT ALREADY RENDERED. AN INFERENCE FROM CIRCUMSTANCES OF A MATERIAL FACT, WHICH IS OPPOSED TO FACTS ESTABLISHED IN THE CASE BEYOND DISPUTE, AND WHICH IS OPPOSED TO ALL REASONABLE PROBABILITIES, DOES NOT RAISE A SUBSTANTIAL CONFLICT IN THE EVIDENCE AND DOES NOT PREVENT THE COURT FROM DIRECTING A VERDICT OR FROM SETTING ASIDE A VERDICT ALREADY RENDERED.

A trial court should not, of course, direct a verdict in every case in which, exercising its *discretionary* and supervisory power over the verdict of a jury, it might think a contrary verdict against the *weight* of evidence. In such a case, when the question is one merely of preponderance of proof, the granting of a new trial rests in the discretion of the trial court. But where it would be the *duty* of the court, to set aside any verdict for one of the parties, it is equally its duty on motion to direct a verdict for the other party. In such a case, as where the evidence or the reasonable probabilities

“are all one way, precluding any sensible decision to the contrary, there is no room for the exercise of discretionary authority,

strictly so called, because there is no basis for more than one decision. The moving party in such circumstances appeals not strictly to the discretionary power of the court for a favor, but stands in the attitude of one demanding a right.

Badger v. Janesville Cotton Mills Co., 95

Wis. 559, 70 N. W. 687;

Flaherty v. Harrison, 98 Wis. 559, 74

N. W. 360;

Vorbrich v. Geuder etc. Co., 96 Wis. 277,

71 N. W. 434;

Cawley v. La Crosse City R. Co., 101

Wis. 145, 77 N. W. 179;

O'Brien v. Chicago etc. Ry. Co., 102 Wis.

628, 78 N. W. 1084."

Collins v. City of Janesville, 117 Wis. 515,

94 N. W. 309, 312.

"We hold the true principle to be, that *if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury.*" (Italics ours.)

Pleasants v. Fant, 22 Wall. 116.

In Minahan v. Grand Trunk Western R. R. Co., 138 Fed. 37, 45, it was said (and in that case held to apply to the facts) that where there was "*substantial testimony to which the jury might, in the exercise of its rightful authority, give credit,*" the trial court was not justified in withdrawing the issue from the jury merely upon his "own estimate of the preponderance of evidence." It was, however, said:

"Undoubtedly, it is distinctly settled that a mere scintilla, a spark, which arrests attention and then from mere lack of vitality fades away, is not sufficient to warrant the submission of an issue of fact to a jury where the scintilla is all that is developed by the party having the burden of proof. Such a showing has no substance, has not the quality of proof, and the judge may lawfully say so to the jury. And it must be admitted that the Supreme Court has gone a step further than this, and assigned to the province of the court the right to direct the jury in those cases standing between those where there is a mere scintilla and those where there is substantial evidence; standing in a borderland, so to speak, where the evidence is so vague, indefinite, or inconsequential as not to furnish a reasonable foundation on which a verdict could rest.

" * * And by 'evidence' we mean something of substance and relevant consequence, and not vague, uncertain, or irrelevant matter, not carrying the quality of 'proof,' or having fitness to induce conviction."*

Cawley v. La Crosse City R. R. Co., 101 Wis. 145, 77 N. W. 179, was a case of the same class. The court reversed the case on the ground that a verdict should have been directed, and held that, in submitting the case to the jury upon such testimony,

"there was a failure to observe the limits beyond which a jury cannot go. They cannot go beyond the boundary of reasonable probabilities in determining facts from evi-

*dence without going into the realms of conjecture or possibility. * * **

Schaub v. Kansas City Southern Ry. Co.

(Mo. App.), 113 S. W. 1163, 1166;

O'Brien v. Chicago etc. Ry. Co., 102 Wis.

628, 78 N. W. 1084 (same principle).

463.

In O'Brien v. Chicago, St. Paul etc. R. R. Co., 102 Wis. 628, 78 N. W. 1084, the right of the court to consider all of the evidence before it on a motion for a directed verdict, was thus well stated:

"The books say, and the rule is, that in determining whether a question is for the jury, the trial court should look only to the plaintiff's evidence, because if there be a conflict of evidence between adversaries in a jury case it is for the jury to say where the truth lies. *But that does not mean that a trial judge must shut his eyes to undisputed facts whether established by one party or another.* It means that the evidence of the plaintiff only is to be considered in case of a conflict between that of the defendant and that of the plaintiff where there is room for different reasonable inferences. *Where the conflict is between evidence on the one side and some fact established beyond controversy on the other, which fact renders the truth of the evidence of the former so improbable that no reasonable or sensible person can believe it, such fact is by no means to be excluded from consideration in determining whether or not there is a question to be*

passed upon by the jury. On the contrary, the fact is to be considered and held controlling in the case. So the rule really is that, in determining whether or not a question should be sent to the jury, the evidence of the party on whom the burden of proof rests in regard to it, only, should be considered, in connection, however, with all facts which are admitted by the pleadings or otherwise established beyond dispute in the case. (Citing cases.)" (Italics ours.)

While the testimony for the government, in this case standing alone, is not sufficient to support a verdict for the government, it is plain beyond the possibility of a doubt, when the evidence for the defendant Construction Company had concluded that the facts "proved beyond dispute in the case" left only one conclusion which a reasonable mind could draw, namely: That the defendant company did not participate in, direct, authorize, assent to or even know of the illegal acts charged to it.

B. The Governing Officers of The Defendant Corporation, and They Only, Should be Regarded as the Corporation in Determining Whether the Defendant Corporation Knowingly Assisted, Encouraged or Solicited the Migration or Importation of Any Alien Contract Laborers.

The defendant Construction Company is a corporation and could act only through its officers and agents, and its criminal liability for the acts

of such officers and agents is co-extensive with, but can extend no further than so far as their act is tantamount to the act of the corporation, or may be said to be the act of the corporation. Otherwise, the interests of the corporation could be destroyed by the conduct and acts of subordinate agents or servants (knowing nothing and caring less about the policy or interests of the corporation), and which conduct and acts were never contemplated by the officers and managers of the corporation, who control and dictate its policy, and who are the only persons whose acts connote corporate action.

A corporation at this day no longer is "without a body to be kicked or a soul to be damned"; its criminal responsibility is well established. It is an entity capable of volition and action, and as far as this case is concerned, answerable for its acts. But the unlawful act must be the act of the corporation. Its constituent members, its stockholders, invest its directors and officers with the power to manifest the voice and will of the corporation, and their manifestation is the corporate manifestation in its outward relation. In the first instance, the corporate relation could only be determined by its stockholders, only through them it could speak and act; they place their power in the hands of its officers and directors and the officers and directors thereby stand in place and stead of the stockholders—

represent the corporate entity—and their act for the corporation alone is the voice and will of the corporation in its outward relation.

In this action, its outward relation to the body politic is questioned, and it is sought to punish the corporation, and thereby its stockholders who alone must bear the burden of the punishment, for alleged unlawful conduct in its outward relation. The unlawful conduct was wholly the conduct of others than the officers or directors of the corporation, to-wit, a mere labor agent and his subordinates. It seems to us the merest truism to say that it cannot be punished for the conduct of such subordinates unless authority therefor emanated from a source identifying the corporation therewith.

In *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, the plaintiff sought to recover exemplary or punitive damages for the illegal, wanton and oppressive acts of the servant and agent of the defendant corporation. The court held that, punitive damages being awarded only as a punishment, it was necessary to show the intent of the corporation to do the act, and that *only the governing officers of the corporation could subject the corporation to punishment, that the corporation, through its governing officers, must have become particeps criminis of the agent's acts.* The court said:

"Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment to the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent, on the part of the agent." * * *

"The president and general manager, or, in his absence, the vice-president in his place, *actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it*, that any wanton, malicious or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself. BUT THE CONDUCTOR OF A TRAIN OR OTHER SUBORDINATE AGENT OR SERVANT of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own UNLAWFUL AND CRIMINAL INTENT, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, a house of trade or commerce."

For the purpose of subjecting the defendant corporation to the penalty provided by section 5 of the Immigration Act of 1907, and forming a guilty knowledge necessary thereunder, the

governing officers of the company, and they only, should be regarded as the corporation itself.

This court, in *Hollard v. Vinton*, 105 U. S. (15 Otto) 7, 26 L. Ed. 998, speaking through Mr. Justice Miller, said:

"Certainly a corporation cannot be charged with any intelligent action, or with intending any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud, is evidenced by the actions of its OFFICERS. And while it may be conceded that for many purposes, they are agents and are to be treated as the agents of the corporation, or of the corporators, it is also true that for some purposes they are the corporation, and their acts, as such officers, are its acts."

In *Hindman v. First National Bank*, 98 Fed. 562 (C. C. A. Sixth Circuit), the court, speaking through ex-President Taft, at that time circuit judge, in speaking of the board of directors of a bank, said:

"This was the GOVERNING BODY of the bank, and although of course, in a certain sense it is an agency or representative of the bank, it is for all practical purposes the bank," citing many cases.

In *Denver & Rio Grande Ry. Co. v. Harris*, 122 U. S. 597, 30 L. Ed. 1146, this court, speaking through Mr. Justice Harlan, recognizes the rule above laid down, and applies it to the facts

in that case by the use of the following language:

"The doctrine of punitive damages should certainly apply in a case like this, where a corporation *by its directing officers* wantonly disturb the peace of the community, and by the use of violent means endangered the lives of citizens, in order to maintain rights for the vindication of which, if they existed, an appeal should have been made to the judicial tribunals of the country. That the defendant, within the meaning of the established rule holding corporations responsible for the misconduct of their servants in the course of its business and of their employment, directed that to be done which was done, is not to be doubted from the evidence, the whole of which is given in the bill of exceptions. Its *governing officers* were in actual command and directing the movements of what one of the witnesses described as the 'Denver and Rio Grande forces,' which were avowedly organized for the purpose of driving the other company and its employees by force from the possession of the road in question." (Italics ours.)

In *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. Ed. 176, we find this language:

"The truth is that the great increase of corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by *corporation officers who were capable of exercising all the corporate powers.*"

So, in Philadelphia W. & R. R. R. Co. v. Quigley, 21 How. 202, 16 L. Ed. 73, a railroad corporation was held liable for a libel published by its board of directors and managing officers. This case was affirmed in Lake Shore & M. S. R. R. v. Prentice, 147 U. S. 108, 37 L. Ed. 97, 103, "*upon the single ground that the evidence clearly showed that the corporation, by its governing officers, participated in and directed all that was planned and done.*"

In accord with the above cited cases are the following:

U. S. v. Kelso, 86 Fed. 304, at 306;

State v. Morris E. R. Co., 23 N. J. L. 360;

Regina v. Gt. N. of Eng. Ry., 58 E. C. L. 315;

Com. v. Proprs. New Bedford Bridge, 2 Gray 339.

This is the view of the law taken by the Supreme Court of the territory of Arizona, and we quote the following extract from the opinion of Chief Justice Kent of said court:

"A corporation, as well as an individual, is capable of forming a guilty intent, and capable of having the knowledge necessary, *provided the officers of the corporation capable of voicing the will of the corporation have such knowledge or intent.*"

There is not a scintilla of evidence in the record that the officers and directors of the defendant Construction Company participated in, authorized, consented to or even knew of the unlawful acts of Carney and his associates. But on the contrary, the evidence shows beyond a reasonable doubt that the unlawful acts of Carney and those acting in concert with him were committed without a semblance of authority, express or implied, from, without any participation therein by, and even without any knowledge of the defendant Construction Company, but were committed in utter disregard of and violation of the positive and unequivocal instructions of the defendant Construction Company. (See pages to of this brief, where evidence is fully examined.)

C. The Distinction Between the Civil Liability of a Corporation for the Acts of its Servants and Agents, and the Criminal Liability of a Corporation for the Criminal Acts of its Servants or Agents is Important in this Case.

This is not an action for damages to one who has suffered through the act of any servant or agent of this defendant company, but is an action to recover a penalty for the commission of a crime. That penalty cannot be incurred by the corporation upon the theory of *respondeat superior*, nor indeed predicated upon the apparent scope of authority (the latter being only an ap-

plication of the equitable doctrine of estoppel). The criminal liability of a principal arises only out of the principal's actual participation in the wrongful act, which he may do personally or direct others to do for him. The law of agency has no place in criminal jurisprudence, the rules of which do not admit of a person being punished without guilty knowledge or guilty intent. This is particularly true of the Immigration Act of 1907, which, in express terms, as heretofore pointed out, makes guilty knowledge an essential element of the offense, and such guilty knowledge must be brought home to the corporation. To say that the principal is liable criminally for the act of his agent or servant, where he assents to, or directs the criminal act of the agent or servant, is but an application of the general rules of criminal law of responsibility for crimes. Such assent or direction imports a criminal participation in the act, a union of act and intent, and in effect, the principal thereby becomes an accessory before or after the fact.

This distinction between the criminal and the civil liability of a corporation for the acts of its servants or agents is pointed out by the United States Supreme Court in *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, and other cases heretofore cited, and cases cited under the next succeeding heading.

D. A Corporation is not Liable Criminally for the Unlawful Acts of its Servants or Agents, Though such Unlawful Acts are Committed in the Corporate Business, Unless Such Unlawful Acts were Directed by, Knowingly Assented to, or Acquiesced in, by the Governing Officers of the Corporation.

- I. THE GENERAL RULE IS THAT A MASTER OR PRINCIPAL IS NOT LIABLE CRIMINALLY FOR THE CRIMINAL ACTS OF HIS SERVANT OR AGENT UNLESS HE DIRECTED, ASSENTED TO OR ACQUIESCED IN SUCH ILLEGAL ACTS.**

As heretofore shown, the governing officers of a corporation, whose will and acts alone in reality constitute the corporate action, are to be regarded as the principal or master. So in discussing this proposition, the officers and directors of the corporation who alone voice the corporate will and whose acts alone connote corporate action, and who, with respect to the relationship of the corporation with the outside world in reality constitute the corporation, are to be considered as the master or principal, and the test, in determining whether the corporation is liable for the acts of its subordinate agents or servants, is to be determined by the question whether or not they, the officers and directors, could be held personally responsible under the law. Of course, if they, exercising the voice and will of the corporation, directed the com-

mission of such unlawful acts by the subordinate servant or agent, or authorized or knowingly assented to, or acquiesced in, the commission of such unlawful act, then, *and then only*, could the corporation itself be held responsible in an action of such a criminal nature as the case at bar.

It is, without doubt, the broad and general rule that the master is not responsible for the criminal acts or misdeeds of his servants, unless he in some way participates in, countenances, or approves of what the servant does or, as it is sometimes put, unless he counsels, commands, aids or abets therein, or procures the commission of the act. He must have knowledge of, and give his assent to, that which constitutes the violation of the law where knowledge is an essential element of the offense, and also as a general rule. In other words, the servant must be acting with the master's authority to do the act which constitutes the crime. If the master does not aid or abet, countenance or approve, or have knowledge, of the act of his servants, it is the general rule that he cannot be punished criminally therefor.

Taylor v. Nixon (1910), 2 I. R. 94;
Rex v. Huggins, 2 Ld. Raym. 1574;
2 New Am. & Eng. Enc. Law & Pr. 834;
20 Am. etc. Eng. Ency. Law 176 (2nd
edition);

- 26 Cyc. 1545;
- 1 Clark & Marshall Agency, page 1140;
- Mechem Agency, paragraph 746;
- 88 Am. St. Rep. 797;
- Hoover v. Wise, 91 U. S. 311;
- Whitton v. State, 37 Miss. 379;
- Anderson v. State, 22 Ohio St. 305;
- Commonwealth v. Nichols, 10 Met. 259;
- Commonwealth v. Junkin, 170 Penn. St.
194;
- Cushing v. Dill, 2 Seammon (Ill.) 460;
- Cushman v. Oliver, 81 Ill. 444;
- Satterfield v. Western Union Tel. Co., 23
Ill. App. 446;
- Satterfield v. Western Union Tel. Co.
(*supra*);
- State v. Baltimore & Ohio R. R. Co., 15
W. Virg. 362, 36 Am. Rep. 803;
- Hall v. Norfolk & Western R. Co., 44 W.
Va. 36, 67 Am. St. R. 757;
- Williams v. Hendricks, 115 Ala. 277, 41
L. R. A. 650;
- State v. Bacon, 40 Vt. 456;
- Parks v. People, 49 Mich. 333;
- Whitcraft v. Vanderver, 12 Ill. 235;
- Nall v. State, 40 Ala. 262;
- Seibert v. State, 40 Ala. 60;
- Spokane v. Patterson, 46 Wash. 93 (13
Am. & Eng. Anno. Cases 706);
- Hipp v. State, 5 Blakf. (Ind.) 149, 33
Am. Dec. 463.

"The criminal liability of a master for an act of his servant does not extend so far as his civil liability, in as much as he cannot be held criminally for what the servant does contrary to his orders, and without any authority, express or implied, merely because it is in the course of his business and within the scope of the servant's employment.

"The civil liability of the master for all acts done by his representative in the course of duty, notwithstanding that such acts are, in fact, unauthorized or prohibited, is required by the necessities of everyday life and business intercourse; but criminal responsibility is quite different."

Taylor v. Nixon (1910), 2 I. R. 94.

In *Rex v. Huggins*, 2 Ld. Raym. 1574, a leading case on the subject, an indictment was found against the warden of a prison and his deputy for the murder of a prisoner by keeping him in an unhealthy place, etc. It was proven on the trial of the warden that the act complained of was done by the deputy alone without the consent or knowledge of the principal. The court held that though the evidence showed the deputy to be guilty of the offense charged, yet the warden was not liable. It was said by the court in that case that though the defendant was warden, yet, it being found that there was a deputy, he was not, as warden, guilty of the facts committed under the authority of his deputy; that he should answer as superior for

his deputy civilly but not criminally; that though a sheriff must answer for the offenses of his jailor civilly,—that is, he is subject to an action to make satisfaction to the party injured,—yet he is not to answer criminally for the offenses of his under officer; that he only is criminally punishable who immediately does the act or permits it to be done (Hail, P. C. 114); that, therefore, if an act be done by an under officer, unless it is done by the command or direction or with the consent of the principal, the principal is not criminally punishable for it.

The precise relation between the person actually committing the offense and the one sought to be held responsible, that is, whether the persons concerned are master and servant, principal and agent, husband and wife, partners, or whether they sustain any one of these relationships is immaterial, if the connection of both persons is established within the rules of criminal law applicable to principal and accessory.

“The relation of the principal and agent does not appertain to transactions which are illegal, immoral or opposed to public policy. Parties to such transactions are both liable as tort feasers or criminals, and all contracts thus entered into are null and void.”

2 New Am. & Eng. Enc. Law & Pr. 834.

“As a general rule, the master is not criminally liable for the acts of his servant done without his authority, express or im-

plied, merely because they are within the course of his business and within the scope of a servant's employment. Where, however, the master expressly authorizes or co-operates in the criminal act of the servant, he will be criminally responsible therefor as well as the servant."

20 Am. etc. Eng. Ency. Law 176 (2nd edition), and cases cited in note 5.

"A servant who does an unlawful act which would subject him to imprisonment or liability for a penalty if he was acting in his own behalf, is generally personally liable therefor. The master is not criminally liable for the acts of his servant unless committed by his command or with his assent."

26 Cyc. 1545.

"The true ground of the principal's liability in those cases where he is held criminally responsible for the act of his agent, is not because of the relation of principal and agent, for, as has been seen in the earlier part of this work, an agency cannot be created for the purpose of committing illegal or criminal acts, but is on the ground that the principal in the particular case is a principal or accessory to the crime by in some way being privy to or participating in it. As has been said, "Strictly speaking, the legal relation of principal and agent does not exist in regard to the commission of criminal offenses. All who participate in the commission of such offenses are either principals or accessories.
* * * But where the agent's criminal

act is unauthorized and is not sanctioned or acquiesced in by the principal, especially where it is contrary to the principal's direct instruction, the latter cannot be held criminally responsible therefor."

I Clark & Marshall Agency, page 1140.

Professor Mechem, after discussing the criminal liability of the principal for the act of the agent, as concerned mere police regulations made punishable irrespective of knowledge or intent, which form an exception to the general rule as hereinafter demonstrated, states:

"As a general rule, he cannot be held criminally liable for the act of his agent, committed without his knowledge or consent."

Mechem Agency, paragraph 746.

In an extended monographic note, in 88 Am. St. Rep. 797, the learned editor says:

*"The general rule undoubtedly is that a principal is not responsible for the unauthorized acts of his agent. * * * In order to render the principal liable criminally for the crime of his agent, it must therefore appear either that it was committed by his authority, express or necessarily implied, or else that he has in some way participated in it, countenanced or approved its commission. * * * A principal is not therefore responsible criminally for an act of his agent in opposition to his will and against his orders."*

Citing many authorities to sustain the editor's statements.

criminally when the act is in positive disobedience to his explicit instructions."

Cushing v. Dill, 2 Seammon (Ill.) 460. Action to recover penalty under statute for cutting timber. The trees were cut by the servants of the defendant.

"Whether he (the master) would not therefore be liable in another form of action, upon the principle that the master is liable for the acts of his servant, done in the execution of his master's orders, are questions which do not arise in the investigation of this case. * * * This action is brought upon a penal statute, the object of which is to punish the wrongdoer, as well as to recompense the injured individual. To subject anyone, therefore, to the penalty of the act, it must be shown to have been wilfully violated, by proof that the party charged committed the forbidden act himself, OR CAUSED ANOTHER TO DO BY HIS COMMAND OR AUTHORITY. * * * In this prosecution he is liable only for his personal acts, or such acts of his workmen or servants AS ARE PROVED TO HAVE BEEN DONE BY HIS EXPRESS, OR AT LEAST, NECESSARILY IMPLIED, AUTHORITY."

Followed in

Whitecraft v. Vanderver, 12 Ill. 235;

Cushman v. Oliver, 81 Ill. 444;

Satterfield v. Western Union Tel. Co., 23 Ill. App. 446.

In Satterfield v. Western Union Tel. Co., *supra*, an action to recover a penalty under a

similar statute, it appeared that the trees were cut under the directions of the defendant's superintendent of wires; he, however, testified that the company never at any time authorized him to cut these or any other trees. Upon this evidence the act of its superintendent was held not to be the act of the company for which it was criminally liable, it was said:

"It must appear from the evidence that the servant committed the act under the *express direction of the master*, or at least from the nature of his employment authority to do the act was necessarily implied."

State v. Baltimore & Ohio R. R. Co., 15 W. Virg. 362, 36 Am. Rep. 803. Indictment for Sabbath breaking by running trains on Sunday. In this case the question, whether a corporation is subject to indictment, criminally liable, is discussed at length, and answered in the affirmative, but it was held that the approval by the corporation of the act of its agent or servant must clearly appear. And in this case it was held that a shipment on Sunday by the "authorized general agent of the company, who had a general supervision of freight trains" in violation of the standing order of the general superintendent of the defendant company not to ship freight on Sunday, did not show the approval by the company, in the absence of evidence that the order

of the defendant's superintendent had been habitually violated.

Hall v. Norfolk & Western R. Co., 44 W. Va. 36, 67 Am. St. R. 757. Action of debt under statute to recover penalty for an illegal overcharge of rates. The overcharge was made by the conductor in violation of the rules of the company. It was said:

"It is also clear that, while the principal is liable civilly for the acts of the agent, he is not liable criminally. He is liable for acts civil in their nature, not those criminal or penal in nature, *unless done by his authority or assent, or approval.*"

Williams v. Hendricks, 115 Ala. 277, 41 L. R. A. 650. Action to recover a penalty under statute for cutting timber on another's land. The court said:

"Different principles arise when it is sought to hold a principal responsible for the criminal acts of his agent or servant. The act is highly penal and must be strictly construed, and, before a party can be subjected to its penalties, it must clearly appear that he has violated it *knowingly and wilfully*. It is not enough, in such a case, that a partner or servant, without his knowledge, and contrary to instructions and against his assent, has committed the unlawful act. To so hold would be to extend the statute by judicial interpretation beyond its meaning and its positive terms. In the case of Patterson v. State, 21 Ala. 571, it was held that a principal was not bound,

unless he authorized or co-operated in the illegal act of his clerk."

In *State v. Bacon*, 40 Vt. 456, it appeared that a coal dealer sent an employee to deliver coal to a customer. The employee, for convenience of unloading, drove upon the sidewalk in violation of an ordinance. The court said:

"It expressly appears that the respondent had no knowledge that Rabidon (the employee) intended to, or did, drive upon the sidewalk, and that it was done without the authority, knowledge or consent of the respondent. It is evident that the respondent had no reason to suppose that such act would be done. If he is liable, it must be from the legal relation of master and servant, and this when the facts exculpate him from all fault and negligence. Under such circumstances there is no rule of law that can make the respondent responsible criminally for the act of his agent."

In *Parks v. People*, 49 Mich. 333, a prosecution under a statute prohibiting the sale of intoxicating liquors, the statute not having made the act itself criminal without the intent, it is said:

"It is contrary to every rule of law to hold a person criminally responsible for an act in which he has taken no part. He can only be punished for what is his own wrong. Section 2 clearly implied the necessity of criminal intent as an element of the offense.
* * * Whatever civil liability may arise from the acts of a clerk, the criminal re-

sponsibility must fall on the actual wrongdoers who have done or been connected with the violation of the law by some fault of their own."

Nall v. State, 40 Ala. 262, was an indictment against the sheriff for negligently allowing a prisoner to escape. The sheriff had directed the jailer to obey the instructions of his deputy. The deputy instructed the jailer to allow the prisoner the liberty of going without the jail. The order of the sheriff to the jailer was construed by the court as having referred only to such orders as were legal, proper and customary, and did not contemplate according to the prisoner the privilege of going without the jail, and that the order of the deputy to the jailer to this effect was not authorized by the sheriff, and that he was not responsible therefor criminally, and that in the absence of evidence showing the sheriff's knowledge of the order of the deputy, it was error to permit the same to be given in evidence against the sheriff. The court also said:

"As a general rule, if an agent does an illegal act the principal is not responsible for it criminaliter, unless it is shown that the act was done by his express authority."

Seibert v. State, 40 Ala. 60, was an indictment for retailing spirituous liquor. The evidence showed the sale to have been made by the wife

of the defendant, acting as his clerk. The court said:

"The mere fact that the wife was the clerk of the accused and her violation of the law, did not authorize the jury to find the prisoner guilty. The jury should have been satisfied from the evidence beyond a reasonable doubt, that the liquor was sold by the authority of the accused, in order to convict him. A principal is not liable criminally for the unlawful act of his agent or clerk, unless he participated in the act or consented to it, and this participation or consent cannot be presumed by the court or jury merely from the fact that the seller was the clerk of the accused."

Spokane v. Patterson, 46 Wash. 93 (13 Am. & Eng. Anno. Cases 706), was a prosecution for a violation of a state ordinance. The court said:

"The principal is in general not liable criminaliter for the act of his agent, unless it is committed by his command or with his assent."

The conviction in this case was sustained on the ground that the ordinance was mere police regulation, not requiring a guilty intent, and that the general rule did not therefore apply to the ordinance.

Hipp v. State, 5 Blakf. (Ind.) 149, 33 Am. Dec. 463. Indictment for selling intoxicating liquors to an intoxicated person, by his servant. The court said:

"The general rule is, that a master is liable in a civil suit for the negligence or unskilfulness of his servant, when he is acting in the employment of his master; but that he is not subjected to be punished for the offenses of his servant, UNLESS THEY WERE COMMITTED BY HIS COMMAND OR WITH HIS ASSENT."

2. THERE IS AN EXCEPTION TO THE GENERAL RULE UNDER STATUTES IN CASES WHERE GUILTY KNOWLEDGE OR INTENT IS NOT AN ESSENTIAL ELEMENT IN THE OFFENSE, AND THE ACT DONE IS ABSOLUTELY PROHIBITED WHETHER DONE BY MASTER OR SERVANT WITTINGLY OR NEGLIGENCELY OR INNOCENTLY; ALSO, OF COURSE, UNDER STATUTES WHERE THE MASTER IS BY THE EXPRESS TERMS OF THE STATUTE MADE CRIMINALLY LIABLE FOR ACTS DONE.

There is an exception to the general rule hereinbefore stated which is due to the fact that under the particular statute involved, or by reason of public policy, the act done is absolutely prohibited, being police or fiscal regulations such as the liquor laws, pure food laws, license laws, revenue laws; safety appliance act, or cases where the statute expressly makes the master responsible for the acts of his servants, such as the Elkins Act prohibiting rebating, or cases where the master has intrusted a dangerous in-

strumentality to the servant, such as a newspaper, where the servant printed a criminally libelous article. Under such statutes, and in such cases, certain acts are absolutely forbidden under any circumstances, and it is the policy of the law to prohibit them, *irrespective of what the motive or intent or knowledge of the person violating the statute may be*. Criminal intent or guilty knowledge, in such cases, is unnecessary to constitute the offense.

"The law in these cases seems to bind the party to know the facts and to obey the law at his peril."

Greenleaf, 16th Ed., Secs. 21, 26, and notes.

As was said in *State v. Kittelle*, 110 N. C. 560, 15 L. R. A. 694, 28 Am. St. Rep. 698, 15 S. E. 103, the retailing of liquor is not a matter of natural right, and the whole subject is within the police power of the state, which can leave it unrestricted, or hedge it about with regulations, or forbid it entirely. When regulations are imposed, as in this case, the licensee is criminally liable for their non-observance, whether by himself or his servants, or whether the violation is intentional or due to negligence or is entirely innocent.

Mr. Justice Harlan, in the opinion of the court, in *Chicago, B. & Q. R. Co. v. U. S.*, 220 U. S. 559, says:

"The power of the legislature to declare an offense and to exclude the elements of KNOWLEDGE and due diligence from any inquiry as to its commission, cannot, we think, be questioned." (Citing many cases.)

The opinion then quotes with approval the following extract from 3 Greenleaf on Evidence, 16th Ed., Secs. 21, 26, and notes:

"Where a statute commands that an act be done or omitted, which, in the absence of such statute might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers alike being innocently ignorant of the fact, yet the forfeiture is incurred notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police and other laws and regulations, for the mere violation of which irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law in these cases, seems to bind the party and know the facts at his peril." (Citing many cases.)

These decisions of the United States Supreme Court under the "safety appliance acts" and the citation above from Greenleaf being based on the fact that the legislative body intentionally omitted to make "knowledge" an essential ingredient of the offense condemned, indicate most

strongly that where the legislative body has intentionally expressly made either "knowledge" or "failure to exercise ordinary care" an essential ingredient of the act condemned, a different rule would prevail.

The Supreme Court of the United States had occasion in *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 281; *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559-579, 55 L. Ed. 582; *Delk v. St. Louis & S. F. Co.*, 220 U. S. 580, 55 L. Ed. 591, to construe what is known as the "safety appliance acts" (27 Stat. at L. 531, Chap. 196; 29 Stat. at L. 85, Chap. 87; 32 Stat. at L. 943, Chap. 976). These acts of congress provide that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard," and "Sec. 6, relating to the penalty, is expressed in terms which embrace every violation of any provision of the preceding section."

The court held in those cases that congress had designedly omitted to make "knowledge and diligence on the part of the carrier ingredients of the act condemned," and that (to quote from the syllabus of the second case)

"A carrier using, in moving interstate traffic, cars whose conditions does not satisfy the safety appliance acts. * * * cannot escape the penalty therein prescribed by showing that it exercised reasonable

care in equipping its cars with the required safety appliances, and used due diligence to keep them in repair by the usual inspection but the statutes impose an *absolute duty* upon the carrier which is not discharged by the exercise of reasonable care or diligence."

The reason for such omission to make knowledge an essential element of the statute is thus stated:

"Its omission was intentional, in order that this statute might induce such a high degree of care and diligence on the part of the railway company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and safety of its employees."

Statutes expressly imposing a criminal liability on the master for the misconduct of his servant in doing an act absolutely prohibited on the grounds of public policy have been held constitutional. In the leading case on this subject, *N. Y. C. & H. R. R. Co. v. U. S.*, 212 U. S. 481, 53 L. Ed. 613, the statute known as the "Elkins Act" (32 Stat. at L. 847, Chap. 708; U. S. Comp. Stat. Supp. 1907), page 880, among other things provides:

"(1) That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce, and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee,

lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation; and, upon conviction thereof, it shall be subject to like penalties as are prescribed in said acts, or by this act, with reference to such persons, except as such penalties are herein changed.

* * * * *

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission, or failure of such carrier, as well as that of the person."

The Elkins Act was passed February 19, 1903, and further provided

"That every person or corporation who shall offer, grant or give or solicit, accept or receive any such rebates, concession or discrimination shall be guilty of a misdemeanor, etc."

In 1906, the Hepburn Act re-enacted the Elkins Act, and inserted the word "knowingly" in the act so that the same read: "That every person or corporation who shall *knowingly* offer, grant, etc." The rebates were made in 1904 by the general freight traffic manager and the assistant freight traffic manager, at a time when under the statute in force at the time it made

no difference whether the act was *knowingly* done or not knowingly done. The court said:

"In this case, we are to consider the criminal responsibility of a corporation for an act done while an authorized agent of the company is exercising the authority conferred upon him."

* * * * *

"The purpose of the act was to make the act one of the corporation as well as the agent, and to include both within the *prohibition* and restriction of the statute, and this seems to be the accepted practice."

The court held the statute was constitutional and that the corporation was criminally responsible. This case is distinguishable from the case at bar for the following reasons: (*First*) *The statute expressly provided that the knowledge and intent of the agent acting within the scope of his authority should be imputed to the corporation*; there is no such provision in the Immigration Act of 1907 under which the present suit was brought. (*Second*) The "Elkins Act," then in force *absolutely prohibited* the doing of the act, whether done *knowingly* or *not knowingly*, and whether done by principal or agent, while the Immigration Act of 1907 was directed solely against a knowing violation of the statute, and made guilty knowledge an essential ingredient of the offense. (*Third*) The acts done in that case were done by officers of the company, to-wit: the *general freight traffic manager* and

assistant freight traffic manager, actually wielding the whole executive power of the corporation with respect to freight rates, and whose acts and intent were final and constituted the act and will of the corporation; while the acts and intent in the present case were those of a very subordinate labor agent, not an officer of the corporation, and whose acts and intent could not connote corporate action.

The Elkins Act expressly imposes a duty on the master which does not under the general rule devolve upon him, namely, to choose at his peril servants who will not violate the statute and to exercise vigilant control over them at his peril to see that they do not violate the statute, and is based on grounds of public policy to insure the absolute observance of the law upon all engaged in interstate carriage of goods and to stamp out the practice of rebating.

All that the Supreme Court decided in *N. Y. C. & H. R. R. Co. v. U. S.* (*ante*) is that a statute imposing such a duty on the master is not unreasonable, but is founded on grounds of public policy. So if Congress had seen fit, in passing the Immigration Act, to make the employer of labor the absolute insurer of the lawful conduct of the labor bureaus patronized by it, such a provision would not have been unreasonable or unconstitutional. But Congress did not so

provide, but on the contrary, provided that he only should be punished who *knowingly* violated the law; therefore, the general rule requiring some participation in the offense by the governing officers of the corporation is applicable to the present case.

The liquor statutes which expressly impose criminal liability on the master for illegal sales by his servants have also been held constitutional. In Arkansas, by a statute passed in 1879, the legislature in effect declared that persons interested in the sale of ardent spirits, etc., should be criminally responsible for illegal or forbidden sales, whether made by themselves, or their partners or employees in the business. Ch. J. English, in his opinion in *Robinson v. State*, 38 Ark. 641, said:

"This is a departure from common law principles, and a new feature in the legislation of this state. The whole act is but a police regulation of the sale of ardent spirits, etc., and the feature in question violates no clause or provision of the Constitution. The law says to persons wishing to engage in ~~selling~~ spirituous liquors, or to be interested in sales thereof, you must be careful in the selection of your partners or servants, and watchful of their conduct in your business, for if they make forbidden sales you are responsible. You must see that sales in which you are interested are not made without license, nor made to minors without proper permission from their parents or guardians if you are not willing

to engage or be interested in the business on these terms, there is no compulsion upon you to do so."

The offense of admitting minors to a billiard room contrary to the provisions of a statute *absolute* in form has been held to be of that class in which knowledge or guilty intention is not an essential ingredient, and, consequently, if minors are actually present in the room and suffered to remain there, either by the proprietor or his servants who have charge thereof, it is irrelevant and immaterial to prove that the proprietor had forbidden them to enter, or that he was not present at the time. The prohibition was absolute; *knowledge* was not an element of the offense, as it is by the express terms of the Immigration Act of 1907.

Com. v. Emmons, 98 Mass. 6.

The general proposition to be gathered from the cases holding the master responsible for the act of his servant committed without his knowledge or consent or authority, show that the rule *mens rea* did not necessarily extend to cases where, from reasons of public policy, the law has required certain acts to be done or regulations to be observed; and distinction appears to be extended also to a certain class of revenue enactments where the objects of the excise and public revenue are considered to be of such paramount

importance that no excuse for their infringement, upon the ground of want of knowledge, is allowed.

Hosford v. Mackey, 2 I. R. 292.

As was said by the court in Walters v. State, 174 Ind. 545, 92 N. E. 937:

"The regulations prescribed by law were designed by the legislature to subserve the public welfare. This purpose is dominant, and its attainment must not be sacrificed, although, in special cases, individual inconvenience and loss be sustained."

"Criminal intent is not an essential ingredient of the offense charged against appellant. The law prohibits all persons without licenses from selling liquor, either directly or indirectly, and is explicit and mandatory. When appellant elected to engage in the sale of articles subject to legal restrictions, he did so at his own peril, and cannot escape responsibility for the non-observance of such regulations, on the ground that he did not knowingly violate the law."

"Many statutes which are in the nature of police regulations, as this, impose criminal penalties, irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public, which shall render violation impossible."

People v. Roby, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 265.

The following cases are in accord, showing that in such cases, where criminal intent is not an essential element in the offense, and where

the act is absolutely prohibited, whether committed knowingly or innocently, by principal or agent, master or servant, the master is criminally responsible, whether he participated in or knew of or consented to such act, or not.

State v. Gilmore, 80 Vt. 514, 16 L. R. A.

(N. S.) 786, 68 Atl. 658, 13 Ann. Cas.

321;

Nadorff Bros. v. Louisville, 144 Ky. 135,

137 S. W. 854;

Olson v. State, 143 Wis. 413, 127 N. W.

975;

Lehman v. District of Columbia, 19 App.

D. C. 217;

State v. Nichols, 67 W. Va. 659, 33 L.

R. A. (N. S.) 419, 69 S. E. 304, 21

Ann. Cas. 184.

Intent or guilty knowledge was not an essential ingredient of the unlawful sale of liquor to minors in the following cases, and on that ground the master, who was licensed, was held responsible, although he did not authorize the sale or consent to it.

State v. Tomasi, 67 Vt. 312, 31 Atl. 780;

State v. Ackerly, 79 Vt. 69, 118 Am. St.

Rep. 940, 64 Atl. 450, 8 Ann. Cas.

1103;

Carroll v. State, 63 Md. 551, 3 Atl. 29.

Where intent is not an ingredient of the offense, the fact that the master instructed the servant not to do the unlawful act is immaterial.

McCutcheon v. People, 69 Ill. 606, 1 Am. Crim. Rep. 471;

Mogler v. State, 47 Ark. 110, 145 S. W. 473;

Snyder v. State, 81 Ga. ..., 43 L. R. A. (N. S.) 753, 12 Am. St. Rep. 350, 7 S. E. 631;

Whitton v. State, 37 Miss. 379;

O'Donnell v. Com., 108 Va. 882, 62 S. E. 373.

Where *guilty* knowledge that one is acting in violation of the law is not essential to the offense of selling intoxicating liquor, one who has a license is bound at his own peril to keep within the terms of it, whether he conducts the business personally or by agents.

Com. v. Uhrig, 138 Mass. 492, 5 Am. Crim. Rep. 323;

People v. Blake, 52 Mich. 566, 18 N. W. 360;

State v. O'Connor, 58 Minn. 193, 59 N. W. 999.

So where a statute of Massachusetts (Mass. Stat. 1886, chap. 318, sec. 2) makes the master liable for a sale by himself, or by his servant or agent, of milk not of the standard quality, it has

been held that *no criminal intent on the part of the master or principal is necessary* in order to render him liable for a sale in violation of the statute, and that he may be held liable for an inadvertent sale made on the part of his servant or agent in violation of the statute.

Com. v. Warren, 160 Mass. 533, 36 N. E. 308.

See also, to same effect,

Brown v. Foot, 66 L. T. N. S. 649, 17

Cox C. C. 509.

3. IN THE CASE AT BAR THE GUILTY KNOWLEDGE OF THE DEFENDANT COMPANY IS AN ESSENTIAL INGREDIENT OF THE OFFENSE. THE GENERAL RULE APPLIES THAT THE MASTER IS NOT CRIMINALLY RESPONSIBLE UNLESS HE PARTICIPATES IN, AUTHORIZES OR CONSENTS TO THE UNLAWFUL ACT. THE EXCEPTION TO THE RULE IN CASES WHERE KNOWLEDGE IS NOT AN ESSENTIAL ELEMENT OF THE OFFENSE HAS NO APPLICATION TO THE PRESENT CASE.

We have already shown that the Immigration Act of 1907, subdivision 5, by its express terms makes guilty knowledge an essential ingredient to the offense, and that only those incur the penalty who violate section 4 of the statute "knowingly." (Part I of this brief.) In other

words the statute is not absolute, but imposes the penalty only on those who violate it "knowingly." There is no escape from the meaning of the word "knowingly" and explanation cannot clarify it.

In *St. Louis & S. F. R. Co. v. U. S.*, 169 Fed. 69, an action to recover a penalty for a violation of an Act of Congress, it is said:

"The qualifying words cannot be disregarded. They mean something, and whatever that may be is an essential element of the very right to the penalty. 'Knowingly' evidently means with a knowledge of the facts, which, taken together, constitute the failure to comply with the statute."

Felton v. U. S., *supra* (96 U. S. 699), was an action to recover a penalty for failing to comply with an Act of Congress relating to distillers of spirits. In addition to the paragraph previously quoted, the court further said, page 703:

"But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade the provisions, and the usual means to comply with them are adopted. All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of everybody."

In *U. S. v. Beatty*, 24 Fed. Cases 14555, an action was brought to recover a penalty under

an Act of Congress against the master of a vessel, for failure to deliver a letter. The letter was proved to have been in the possession of the clerk of the master, and it was contended that the clerk of the boat was the agent of the master, and the act of the clerk was the act of the master, on the maxim "*Qui facit per alium, facit per se.*" The court so instructed the jury, and this instruction was held error and a new trial ordered. The court said:

"The act is penal in its consequences, and must be strictly construed, and as knowledge is generally the principal and indispensable ingredient in offenses, it would seem reasonable to hold the government to proof of it, or to proof of circumstances from which it might be fairly inferred, before the penalty can be demanded. The knowledge on his part, express or implied, I regard as essential to his liability, and without which the Acts of Congress have no application and do not embrace the case."

In an English case, *Chisholm v. Doulton*, 22 Q. B. D. 736, it is said:

"Now, the general rule of law is that a person cannot be convicted in a proceeding of a criminal nature unless it can be shown that he had a guilty mind. * * * It is a general principle of our criminal law that there must be, as an essential ingredient in a criminal offense, some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge, but as a general rule there must be something of the kind which is designated

by the expression '*Mens rea*.' Moreover, it is a principle of our criminal law that the condition of mind of the servant is not to be imputed to the master."

Verona Central Cheese Co. v. Murtaugh, 50 N. Y. 314. Action to recover penalty for "knowingly" selling or delivering diluted or skimmed milk. The acts were committed by the wife and daughter of the defendant in his service. The case distinguishes at length between the civil liability and the criminal or penal liability for the acts of a servant. The court said:

"The act which gives the penalty sued for, only subjects him who shall knowingly sell, supply or bring to be manufactured, to any cheese factory, diluted, adulterated, or skimmed milk. It is not the act of selling, supplying or bringing to the factory the milk condemned by the law that gives the penalty. If so, it would be immaterial whether the owner and proprietor sold or brought the milk in person or by his servants, or through the agency of third persons. The act might be regarded the act of the principal, and he made liable, although done without his personal knowledge or intervention."

"But the word 'knowingly' in the statute now under review, qualifies the act condemned, and only makes the offense penal when committed by the authority or with the knowledge or assent of the party sought to be charged. The act designedly distinguishes between actual and constructive participation in and assent to the wrongful act, and between actual or per-

sonal, and imputed or constructive notice of knowledge of facts constituting the offense."

"The intent of the act is to punish an individual only for an actual and intentional violation of its provisions. * * * A violation of the statute and a right to the penalty, then, can only be established by proof of a delivery of milk of the character named in the act, with the knowledge or assent, or by authority of the defendant."

A master was held not criminally responsible for "knowingly" allowing liquor to be sold to a girl under fourteen years of age in violation of law, where the sale was knowingly made by the master's bartender, and without the master's knowledge.

Coubon v. Muldowney (1904), 2 Irish Law Reports 498.

Evidence of the possession of adulterated milk by a servant with intent to sell or exchange the same was held not sufficient to convict his master of wilfully and *knowingly* selling it with the intent to sell, in the absence of evidence that the servant was acting for and in pursuance of the will of the master.

State v. Smith, 10 R. I. 258.

To the same effect see:

State v. Hayes, 67 Iowa 27, 24 N. W. 575, 6 Am. Crim. Rep. 335;

Taylor v. Nixon (1910), 2 I. R. 94;

Chisholm v. Doulton, L. R. 22, Q. B. Div. 736.

In *Williams v. Hendricks*, 115 Ala. 277, 41 L. R. A. 650 (*supra*), the court said:

"The act is highly penal and must be strictly construed, and before a party can be subject to its penalties it must clearly appear that he has violated it knowingly and wilfully. *It is not enough, in such a case, that a partner or servant, without his knowledge, and contrary to instructions and against his assent, has committed the unlawful act. To so hold would be to extend the statute by judicial interpretation beyond its meaning and its positive terms.*"

In the case of *Patterson v. State*, 21 Ala. 571, it was held *the principal was not bound, unless he authorized or co-operated in the illegal act of his clerk.*

The court is respectfully referred to the numerous cases (involving prosecutions against the master for the act of his servants, where "knowledge" was an essential element in the offense charged) hereiubefore cited in this brief (pages ..) on the subject of whether "knowledge" was an essential element in the statute under review, failure to allege which is fatal.

E. There is No Evidence in the Case at Bar Which Can Justify or Support a Verdict for the Government Involving a Finding that the Defendant Construction Company Knowingly Induced, Assisted, Encouraged or Solicited, or Caused to be Induced, Assisted, Encouraged or Solicited, the Migration or Importation of Any of the Forty-Five Laborers Named in the Complaint.

There is absolutely no evidence in the record that any of the governing officers of the defendant corporation, whose acts and purposes alone can be said to connote corporate action or the corporate will, personally participated in any of the acts charged to the defendant construction company. The evidence is undisputed that each and all of the acts charged to the defendant company were in fact committed by W. W. Carney, a subordinate labor agent at best, and those employed by him, who was incapable, of his own initiative, of doing any act for which the defendant company could be criminally held responsible.

Unless, therefore, the government has shown that one of the governing officers of the defendant corporation authorized, directed, or knowingly acquiesced in, the acts of Carney and those acting under him, the defendant corporation cannot be held responsible, and this case should on that account alone be reversed. Un-

less this is shown, so far as this action is concerned, Carney and those acting under him, is to be regarded as a total strangers to the defendant company, for whose acts the defendant company can in no manner be responsible. In other words, unless the government can point to some evidence in the record, from which unbiased men might reasonably draw the conclusion that one of the governing officers of the defendant corporation was "*particeps criminis*" in the acts of Carney, there is no principle of law which would warrant a verdict in favor of the government. The "*particeps criminis*" of the defendant company has not been established by even a scintilla of evidence, and the evidence shows, as we shall now proceed to point out, that each and all of the governing officers of the defendant corporation, who alone are identical with the corporation, with respect to its outward relations "were innocent of the demerit of this transaction, having neither directed it nor countenanced it nor participated in it in the slightest degree." (3 Wheat. 559.) We now, with confidence, stand before this court and demand reversal of the judgment in this case, upon the elementary principle of criminal jurisprudence that no one can be punished for the act of another.

- (1) THERE IS NO EVIDENCE THAT THE DEFENDANT CONSTRUCTION COMPANY CAUSED, AUTHORIZED, OR DIRECTED W. W. CARNEY, OR ANYONE ACTING UNDER HIM, TO INDUCE OR SOLICIT, BY ANY OFFER, OR PROMISE, OR AGREEMENT OF EMPLOYMENT, OR TO ASSIST, ENCOURAGE OR SOLICIT, THE IMPORTATION OR MIGRATION FROM MEXICO OF ANY OF THE FORTY-FIVE LABORERS NAMED IN THE COMPLAINT.

The defendant corporation was engaged in a lawful enterprise requiring a large number of laborers, whom it was proper and lawful to secure through the aid of employment offices, and who, of necessity, must be secured in the immediate vicinity of its work in the United States. The defendant Construction Company had, for a long time, been engaged in the business of railroad construction. In the fall of 1909, to-wit, on August 10, 1909, it executed a contract with the Arizona & Colorado Railroad Co., as party of the first part, to grade and construct a new railroad from Kelton, Arizona, southerly to Naco, Arizona, the latter town being situate on the boundary line between Arizona and Mexico. In this contract the Railroad Company agreed to provide, without cost to the Construction Company, "transportation for common laborers from points on lines owned or controlled by the Southern Pacific Company within

the territories of Arizona and New Mexico to Kelton, Arizona, but will provide no return transportation for such employment." This contract was introduced in evidence as defendant's Exhibit "I." [Tr. p. 134, fol. 290.]

This contract was in every respect lawful, and contemplated no illegal act. It is to be noted that free transportation was given the Construction Company only within the territories of Arizona and New Mexico, and not within the country of Mexico. At the time of the commission of the acts complained of, this was the only contract in force, of which the Construction Company was a party, respecting the execution of any work in the territory of Arizona. [Tr. p. 71, fol. 155.]

A large number of laborers was necessary to grade and construct this railroad from Kelton, Arizona, to Naco, Arizona, both of which are in the southern part of Arizona. In fact, about five thousand laborers were used by the Construction Company between August and November 1st, 1909. From a practical view point, it was necessary to secure laborers in the immediate vicinity of the work, and the work being in the southern portion of Arizona, near the northern boundary of Mexico, a large portion of these laborers must be secured from the cities and towns in the southern portion of Arizona.

- As is usual in any business requiring the ser-

vices of a large number of laborers, the aid of employment offices is resorted to. This was perfectly proper for the defendant Construction Company to do, and it is not to be criticised in any way for so doing. The demand of business concerns for securing laborers promptly has increased to such an extent that men devote their entire time to keeping in touch with a large number of laborers, and the sources from which laborers can be secured, with a view of supplying this demand. This business is now firmly established through the United States. Certainly the mere patronizing of the men engaged in such business is not open to criticism, and it certainly cannot be the law that anyone patronizes, at his peril, such an employment bureau.

(a) THE MAJORITY OF LABORERS ENGAGED IN RAILROAD CONSTRUCTION WORK IN ARIZONA ARE OF MEXICAN DESCENT.

It is a matter of common knowledge, of which the court may properly take judicial notes, that a large portion of the population of Arizona is of Mexican descent, and that the number of persons of Mexican descent increases as the country of Mexico is approached.

It is also a matter of common knowledge that practically all laborers engaged in the grading and construction of railroads in the southern part of Arizona come from the Mexican popu-

lation and are almost entirely of Mexican descent. This the trial court at Tucson, Arizona, could have taken judicial notice of. A few Indians residing on Indian reservations in Southern Arizona seek such employment, but it is a rare instance when you find a white person or a Chinaman, or people of any but Mexican descent engaged in railroad construction work. Ninety-five per cent of the common laborers are Mexicans. [Trans. p. 112, fol. 243.]

(b) IT WAS PROPER AND LAWFUL FOR ANYONE TO EMPLOY, IN THE UNITED STATES, MEXICAN CITIZENS WHO HAD MIGRATED TO THE UNITED STATES, WHETHER OF THEIR OWN ACCORD, OR WHETHER THEY HAD BEEN UNLAWFULLY INDUCED TO COME BY THE ACTS OF OTHERS, NOT KNOWN TO THE EMPLOYER.

It is to be noted that section 2 of the Immigration Act of 1907, specifying the classes of aliens which shall be excluded from admission into the United States, does not include all alien laborers, but only "such persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment, or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled." Under the principle

of *inclusio unius, exclusio alterius*, all Mexican citizens who do not come within the statutory definition above stated of contract laborers, have a perfect right, under the statute, to come from Mexico to the United States at their pleasure, and, as a matter of fact, a great number of laborers who are citizens of Mexico are constantly passing to and fro across the international boundary line between the United States and Mexico, at points of entry, such as Nogales, Arizona, and Naco, Arizona. It is to be noted, in this regard, that some of the forty-five laborers named in the complaint had, previous to the 29th day of October, 1909, been within the United States on numerous occasions.

For instance, Jose Acuna stated that he had been in the United States about eight times between April, 1905, and the year 1910, during which time he spent over two years in the United States. [Tr. pp. 100, 101, fols. 218, 219.]

Like Jose Acuna, probably a large number of the Mexican citizens coming to the United States were attracted by the higher wages to be obtained in this country.

This being the case, towns and cities in the United States which are border towns are considered to be good labor markets, and were, in fact, good labor markets, by reason of the number of laborers congregating in such towns

In view of the express provision of section 5

of the Immigration Act of 1907, providing that he only shall be subject to the penalty therein named who "*knowingly*" assists, encourages or solicits the importation or migration of alien contract laborers, it follows that the employment of Mexican citizens who are already within the United States, whether lawfully so or not, may be lawfully employed, provided the employer did not know that they had been unlawfully induced to come to this country. Being already within the United States, the mere subsequent employment of such Mexican citizens would be lawful, for a man could not be said to have, by so doing, induced or solicited a laborer to come to this country who was already here. The statute is directed solely to inducements, offers or agreements made "previous" to the migration or importation of such laborers, and as directed against the prepayment, or other material assistance, to such alien laborer, by means of which he is induced or enabled to thereafter come within the United States. This proposition is so plain, from the mere reading of the statute, that there is no room for the contrary instructions.

F. There is No Evidence that the Contract of the Construction Company With Carney Authorized or Contemplated Any Violation Whatever of the Immigration Act, but on the Contrary, the Undisputed Evidence Shows that Strict Orders were Given by the Construction Company to Carney Not to Assist, Encourage or Solicit the Importation or Migration of Any Laborers From Mexico, and Not to Even Talk to Laborers in Mexico.

(1) THE CONTRACT WITH CARNEY, ITS TERMS AND HIS INSTRUCTIONS.

Mr. Angus Cashion, who was the assistant general manager of the defendant Construction Company, in charge of the work of the company in the territory of Arizona [Tr. p. 108, fol. 235], for the purposes of this argument, may be considered as the vice-principal actually wielding the executive power of the corporation. W. W. Carney was forwarding agent for the Southern Pacific Railway of Mexico, and, as the evidence shows, occupied a position of trust and responsibility with that railroad company. Carney, though living in Arizona, had his office in Nogales, Mexico. [Trans. p. 45, fol. 95.]

Carney, it seems, in the latter part of August or the first part of September, approached Mr. Angus Cashion at the Montezuma Hotel, in Nogales, Arizona, in the presence of Mr. Charles E. Pearce, and requested that he be permitted

to make some money in the shipping of laborers to the defendant Construction Company. It is to be noted that Mr. Angus Cashion was approached by Carney, and that Carney was not approached by Mr. Angus Cashion. Carney, as forwarding agent for the Southern Pacific Railway of Mexico, had his office in Nogales, Mexico, and the first thought that would naturally occur to a conservative, prudent man, anxious to obey the law, was exactly that which occurred to Angus Cashion. "How do you expect to get these laborers," was his immediate query. [Trans. p. 108, fol. 236.] Carney replied, "Right here in Nogales. There is a good deal of labor here to be had at all times." [Trans. p. 115, fol. 251], and spoke of opening offices at Nogales, Arizona, Douglas, Arizona, and Naco, Arizona, to hire laborers.

Upon this representation and statement Angus Cashion made a contract with Carney to secure laborers for the Construction Company.

Carney's statement of what the contract was is as follows:

"I had something to do with the procurement of laborers for Grant Brothers Construction Company. I had a contract under which I operated. It was a verbal contract. Prior to October 28th and 29th, 1909, in the last two or three days of August, or the first four or five days of September, 1909, I made a verbal contract concerning the procuring of laborers for

them. The contract I made with Mr. Angus Cashion, who was to pay me one dollar a head for every man delivered on the works at Courtland, and he was to allow me twenty cents a meal, gold, for feeding the men en route. I supposed the transportation was to be furnished by Grant Brothers." [Trans. p. 45, fol. 96.]

The above extract is from Mr. Carney's direct examination, and it is to be noted that counsel for the government designedly refrained from bringing out all of the terms of Carney's contract. However, Mr. Carney, upon cross-examination, goes more fully into the terms of his contract. He says:

"The arrangement with Mr. Angus Cashion in reference to obtaining laborers was in the last two or three days in August, or the first three or four days in September, 1909. We were at the time in the Montezuma Hotel, in Nogales, Arizona. I don't know whether or not any one else was present. Mr. Pearce was about the hotel. Mr. Angus Cashion, so far as I know, is general foreman of Grant Brothers. There had been some laborers shipped at that day, and I said to Mr. Cashion that Mr. Cashion gave me a chance to make a dollar on shipping some of these laborers. We talked quite a bit, and he agreed to give me a dollar a head for every man I delivered to the works in Arizona, and the actual cost of food for the men, not to exceed twenty cents a meal. I was to be at all the expense of seeing that these men were delivered there. I WAS TO GET THESE MEN AT NOGALES, ARIZONA. We also talked to see whether I could get some men in Douglas, Arizona. and Naco, Arizona. Mr. Cashion gave me instructions as

to where I was limited in getting those men. He said: 'YOU KNOW THE IMMIGRATION LAWS. YOU KNOW ALL THESE THINGS, AND WHATEVER YOU DO, YOU MUST GET MEN ON THE AMERICAN SIDE, AND NOT GO INTO MEXICO FOR MEN, NOR DO ANYTHING IN ANY WAY WHICH WOULD COMPLICATE US IN THIS MATTER—MOST POSITIVELY.' I understood those instructions." [Trans. p. 55, fol. 119.]

Carney, toward the close of his direct examination, also made this statement:

"My contract with Grant Brothers said that they would pay the expenses in ARIZONA; THEY HAD NOTHING TO DO WITH MEXICO." [Trans. p. 55, fol. 118.]

Mr. Angus Cashion and Mr. Charles E. Pearce were the only persons present besides Mr. Carney, and their testimony is without conflict with the statement of Mr. Carney, the government's own witness, as to the terms of the contract. Mr. Pearce testified:

"I was present and heard a conversation between Mr. Angus A. Cashion and W. W. Carney, which occurred at the Montezuma Hotel, Nogales, Arizona. I should say, in the very last day of August, of last year. Mr. Carney approached Mr. Cashion with a proposition to furnish Grant Brothers Construction Company with some labor on the road to be constructed from Courtland in Arizona; I think he expressed it, 'I would like to make a dollar, if I could, out of this'—to Mr. Cashion; and Mr. Cashion said, 'Why, how can you furnish us any labor—where do you expect to get it,' and he said, 'RIGHT HERE IN NOGALES; THERE IS A GOOD DEAL OF

LABOR HERE TO BE HAD AT ALL TIMES,' and then he talked about the compensation. Mr. Carney said he would be willing to furnish labor at one dollar per head, delivered on the work, and Mr. Cashion also to pay what expenses there might be incurred in feeding the men; and Mr. Cashion said, 'How do you expect to obtain this labor, and handle it.' He said: 'I EXPECT TO OPEN AN OFFICE HERE IN NOGALES, ARIZONA, AND SHIP THE MEN UP TO YOU.' Mr. Cashion considered it awhile, and he said: 'I think the compensation is very reasonable, BUT I WANT IT DISTINCTLY UNDERSTOOD THAT YOU CONFINE YOURSELF AND YOUR EFFORTS ENTIRELY TO THE ARIZONA SIDE—NOGALES HERE.' Mr. Carney said: 'There is a good deal of labor here, and I can pick up enough right here to make it a good object to me to ship the men up there.' " [Trans. p. 115, fol. 251.]

The testimony of Mr. Angus Cashion on this subject is as follows:

"I am assistant general manager of the defendant, Grant Brothers Construction Company. In the latter part of August and September, 1909, I had charge of the works of that company between Kelton and Naco, in the territory of Arizona. The company at that time was building a railroad grade between Kelton and Naco, for the Arizona and Eastern Railroad. I know W. W. Carney; I saw him in the latter part of August, and the first part of September, 1909, in Nogales, Arizona. We were sitting in front of the Montezuma Hotel, in Nogales, Arizona. Mr. Pearce, bookkeeper and paymaster of Grant Brothers Construction Company, was around the hotel somewhere, and I had a conversation with Mr. W. W. Carney. Mr. Carney came to me and wanted to know if he could not

furnish Grant Brothers some laborers. He said he was anxious to make a few dollars. I told him I didn't know, at that time we had a labor agent in the field over at El Paso. Then I asked Mr. Carney: 'How do you expect to get these laborers?' He said he expected to open offices, one at Douglas, Arizona, one at Nogales, Arizona, and one at Naco, Arizona, for the purpose of hiring those laborers. Mr. Carney wanted to know what we would pay him, and I told him I hadn't figured out what the laborers were costing us at that time. Then I told him we could afford to pay him a dollar a head for those laborers, and their expenses en route, and I told him we would do that. By their expenses, I meant for their meals, two meals, one at Benson and one at Kelton. The price of the meals that we were to pay was fixed at twenty cents a meal. The road referred to that they were coming over was the old S. P., I guess they called it the old Burro line at one time, from Nogales, Arizona, to Benson. From there they went over the main line to Pearce. I think they changed cars at Pearce, and went down that spur to the end of the line at Kelton, at that time. Their meals were to be paid for only on that route. I also stated to Carney at the time: 'UNDER NO CONDITIONS DO YOU WANT TO GO INTO OLD MEXICO AND EMPLOY ANY LABORER; WE DON'T WANT YOU TO SOLICIT OR TALK TO A MAN ON THE MEXICAN SIDE.' Those were my words to Mr. Carney, and that was about all I had to say. That was about the latter part of August, or the first part of September." [Trans. pp. 108, 109, fols. 235, 236.]

On cross-examination, Mr. Angus Cashion stated:

"I am not very well acquainted in Nogales. I have been practically living down in Mexico for the past three years. I am fairly familiar with labor conditions in Mexico. I and the company have handled a great many men in Mexico. I knew Mr. Carney's office was in Nogales, Sonora. Mr. Carney said that he was going to open offices in Nogales, Arizona, Naco, and Douglas and El Paso. These three towns I mentioned are along the border, between Arizona and Texas and Mexico; but Mr. Carney was not going to El Paso. We had another man there. We had a labor agent at El Paso, and Mr. Carney was not to open an office there, only at Naco, Douglas and Nogales; these towns are on the border line between Arizona and Sonora. I don't know, but approximately Nogales has probably ten thousand inhabitants. *I expected at that time to get laborers who were in Nogales, that was the contract I made.* I did not desire that Mr. Carney open offices along the line between Nogales and Sonora, he said he would do that. He said that was the way he was going to handle the labor, and I said that was alright." [Trans. p. 109, fols. 238, 239.]

On redirect examination, Mr. Cashion stated:

"I know that there are at all times crowds of Mexicans coming across at these places and seeking employment. There are men crossing there all the time. But at Naco, Arizona, there are men coming in continuously from that point, when we were in close there. Nogales is the same. One of the best labor markets in the territory. That is what Mr. Carney said to us. Nogales, Arizona, is supposed to be a good labor market." [Trans. p. 110, fol. 239.]

On recross-examination, Mr. Cashion further testified:

"Known to be a good labor market, that is what Mr. Carney said. I know that there are Mexicans coming across there all the time." [Trans. p. 110, fol. 240.]

The above is a full and complete statement of all the testimony bearing on the contract made by Mr. Angus Cashion, one of the governing officers of the defendant Construction Company, with Mr. Carney. The testimony is very simple, clear, and without the slightest conflict. No reasonable man, looking at this testimony, can possibly draw the inference that, under this contract, Carney had the slightest authority to procure, or even talk, to a laborer, except in Arizona. The most strained and prejudiced construction of the testimony would not, in the slightest degree, support the conclusion that Carney had any authority, under this contract, to employ, solicit, or even talk to a laborer in Mexico. In order to draw such a preposterous conclusion requires a mind warped by prejudice out of all normal proportions, and without any regard for logical sequence of thought.

- (2) THE POSITIVE AND SPECIFIC INSTRUCTIONS GIVEN TO CARNEY WERE GIVEN IN ABSOLUTE GOOD FAITH. THERE IS NO EVIDENCE TO THE CONTRARY. THIS IS THE ONLY CONCLUSION WHICH CAN BE DRAWN FROM THE EVIDENCE AS A MATTER OF LAW.

The record is barren of even a *scintilla* of evidence that the instructions to Carney were not given in absolute good faith. In fact, the verity and good faith of these instructions is not, and cannot be, questioned. The circumstances under which they were given, and the manner in which they were given, and the uniformity of the testimony of the witnesses both for plaintiff and defendant, point unerringly to but one conclusion, and that is the verity and good faith of these instructions.

Carney, although residing in Arizona, had his office as forwarding agent for the Southern Pacific Railway of Mexico, in Mexico. There was nothing incompatible or open to criticism in executing the agreement in Arizona, but the defendant Construction Company went further. Its vice-principal, Mr. Cashion, in wielding the executive power of the corporation, sought to absolutely protect the corporation against any possibility of a violation of the Immigration laws by Carney. Its vice-principal, knowing that

Carney, in his duties as an employee of the Southern Pacific of Mexico, would have occasion to be in Nogales, Mexico, instructed Carney, in positive and unequivocal language, not to go into Old Mexico to employ any laborer, or even talk to a laborer in Mexico. These instructions were admitted by Carney, as heretofore stated, and Carney understood those instructions and believed that they were given in absolute good faith, and should be rigidly adhered to, for we find him, immediately after securing the contract with the Construction Company, going to the office of C. F. Holler & Co., in Nogales, Arizona, and stating to them:

"I have got a little transaction to talk to you boys. I have got a commission, a little business from Grant Brothers to obtain laborers for the construction of the Arizona and Colorado Railroad." [Trans. p. 64, fol. 138.]

Mr. Ruppelius, one of the two co-partners composing the firm of Holler & Co., represented Holler & Co. at this conversation and answered: "Yes, what about it?" Carney replied:

"Well, I can't do it on the Mexican side, and I would like to have you boys that have your office on the American side to engage these men for this work."

Carney then said he was getting a dollar for each man, which he would divide with C. F. Holler & Co., to which Ruppelius agreed, and the same day Holler & Co. put out a notice in

front of the door. [Trans. p. 64, fol. 138.] Carney told Ruppelius, of Holler & Co., what his instructions were from Grant Brothers Construction Company, telling him that his *instructions from Grant Brothers were "not to have anything to do with Mexicans in Mexico, but only to get men on the American side.* He did not specify any nationality, but *we were to get them on the American side.* HE TOLD ME THAT HIS INSTRUCTIONS WERE THAT WE MUST NOT GET MEXICANS, OR HAVE ANYTHING TO DO WITH MEXICANS IN MEXICO." [Trans. p. 67, fol. 146.]

The United States attorney, on redirect examination, attempted to shake the testimony of Mr. Ruppelius as to Carney's informing him of what his instructions were from the defendant Construction Company, but he was unsuccessful, for Mr. Ruppelius replies:

"I am quite positive that Mr. Carney said to me that we were not to do anything with Mexicans in Mexico." [Trans. p. 68, fol. 146.]

- (3) EVERY LAWFUL INSTRUCTION FROM PRINCIPAL TO AGENT IS TO BE CONSIDERED AS GIVEN IN GOOD FAITH UNTIL THE CONTRARY IS SHOWN.

There being absolutely no evidence, not even a scintilla of evidence, that the instructions given by Cashion to Carney were not given in

good faith, the presumption arises, as a matter of law, that the instructions were given in good faith. This presumption is multiplied in strength by the presumption of innocence to which the defendant corporation is entitled, as heretofore pointed out, in an action such as this, to recover a penalty for the commission of a criminal act.

In *Commonwealth v. Johnston*, 2 Pa. Sup. Ct. 317, it was said:

“Every lawful instruction from principal to agent is to be considered as given in good faith until the contrary is shown, and then *bona fides* of the instruction is for the jury. Under no other theory can the rights of honest men be preserved; and they are entitled to invoke this rule, notwithstanding that some dishonest men may perhaps escape just punishment under its shield.”

In *Hosford v. Mackey* (1897), 2 I. R. 292, Holmes, J., said:

“I wish to say that we are obliged to approach this case on the assumption that the direction given by the defendant to his servant was given in perfect good faith,—that the owner of the fishery, on the last day of the year, was desirous that the fishery should be fished no longer, and that all he could do, short of dismissing the servant, was done to prevent the weir being fished after the first of January.”

The strongest proof of the master's lack of consent to the illegal acts of his servant is that

they were done in violation of the former's positive orders.

4. EVEN IF THE DEFENDANT CONSTRUCTION COMPANY HAD NOT POSITIVELY FORBIDDEN CARNEY TO EMPLOY OR TALK TO ANY LABORERS IN MEXICO, NO IMPLIED AUTHORITY OF CARNEY TO DO AN ILLEGAL ACT CAN BE PRESUMED FROM HIS MERE EMPLOYMENT BY THE APPELLANT.

"Every agency is presumptively a lawful one. If an agent be instructed to do an act, he must execute his agency in a legal manner. He possesses no authority to perpetrate a crime in obeying the instruction of his master."

Russell v. State, 71 Ala. 348.

In Sayers v. Nuckolls, 3 Colo. App. 95, 32 Pac. 187, it is said:

"A servant can have no implied authority to do that which could not be lawful, under any circumstances, for either himself or his employer to do."

To the same effect are the following cases:

Com. v. Stevens, 155 Mass. 421;

Williams v. Hendricks, 115 Ala. 277, 41

L. R. A. 650;

Com. v. Nickols, 10 Met. 259.

In Washington Gas Light Company v. Landon, 172 U. S. 534, the general manager of the defendant corporation, as such, wrote and pub-

lished a libelous article concerning the plaintiff. The libel related to the business of the defendant, and was signed by the general manager of the defendant, in his official capacity, and written by him in response to a letter of inquiry addressed to the defendant. The plaintiff brought his action against the corporation. The Supreme Court held that the extent of the general manager's authority being shown by the evidence, no presumption of authority could be indulged in because of his position as general manager, and where "only one inference could be drawn from the evidence, and that is a want of authority, then the decision is a legal one for the court to decide," and the court held that the lower court erred in submitting to the jury the question whether the said general manager had authority to bind the company, for there was an entire lack of evidence upon which to base a verdict against it.

In *Queen v. Holbrook*, 32 B. D. 60, Lord Chief Justice Cockburn said:

"It is not to be inferred, in my opinion, from the mere employment of the editor to conduct this part of the paper, however wide may be the discretion which they allowed to him in the conduct of it, that they gave him authority to do that which would be contrary to the criminal law of the land. You are at liberty to imply, from the employment of an agent, that whatever he

does in the conduct of the business, according to law, has been sanctioned or authorized; but it is not to be inferred that his employer has given him authority to commit a crime, because he has employed him in the conduct of the business."

It is true that, under certain statutes, in the nature of police regulations and certain fiscal revenue and licensing laws, and such statutes as absolutely prohibit the doing of an act in the conduct of the business, whether done by the master or the servant, in which the element of knowledge and guilty intent constitutes no defense (Safety Appliance Act, for example; Chicago, B. & Q. R. Co. v. U. S., 220 U. S. 559, 55 L. Ed. 582), and statutes where the master is expressly made liable for the illegal acts of his servants in the conduct of his business (for example, the Elkins Act; N. Y. C. & H. R. R. Co. v. U. S., 212 U. S. 481, 53 L. Ed. 613), that the master has a statutory duty at his peril of exercising the greatest diligence to prevent the doing of any illegal act by a servant, and in such cases, a few of the courts have held that the proof of the agency of the party actually committing the illegal act is *prima facie* evidence that such party was authorized so to do by the defendant.

But in the case at bar, the prohibition of the statute is against "*knowingly*" committing a certain act, and knowledge on the part of the

master of the servant's violation of the law is essential to the master's conviction, and the authority of the servant cannot, under such a statute, be presumed. On the contrary, the defendant corporation is presumed to be innocent until the government has proven every essential element of the statutory offense, including the authority of the agent to commit the illegal act charged to the defendant company.

Carney was instructed to employ laborers in Nogales, Arizona. He could have fulfilled every obligation under his contract without in the slightest degree violating the Immigration Act. The defendant company contemplated and expected that he would fulfill his contract in a lawful manner. They had a right to expect that he would do no illegal act. The defendant company did everything within their power, short of not making any contract whatever with Carney, to insure compliance with the immigration statute, and certainly it cannot be said that they should not have made any contract whatever with Carney, who for five years had held a position of responsibility and trust.

G. There is No Evidence in the Record that Any of the Governing Officers of the Defendant Construction Company Had Any Actual Knowledge of the Alleged Illegal Acts of Carney and Those Acting Under Him, and Without Such Knowledge it was a Legal Impossibility for the Defendant Company to Assent to, Acquiesce in, or Ratify Such Acts.

I. THE KNOWLEDGE CONTEMPLATED BY THE STATUTE, ESSENTIAL TO BE PROVEN IN THE CASE AT BAR, IS ACTUAL KNOWLEDGE, AND NOT CONSTRUCTIVE KNOWLEDGE OR NOTICE OF FACTS WHICH, UPON INQUIRY, WOULD LEAD TO ACTUAL KNOWLEDGE, AS STATED BY THE SUPREME COURT OF ARIZONA.

Section 5 of the Immigration Act of 1907, upon which the right of the government to recover penalties in the case at bar is based, provides

“that for every violation of any of the provisions of section 4 of this act, the person, partnership, company or corporation violating the same by ‘*knowingly*’ assisting, encouraging or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars.”

We have heretofore shown that “*knowingly*,” when used in the statute, means with knowledge of the facts subsequently stated, and that, under

this statute, it means with knowledge of the assisting, encouraging, and soliciting of a laborer known to have been induced or solicited to migrate to this country, by reason of an offer, promise, or agreement of employment, and known to be an alien. (See *ante*, pp.)

(a) *Knowingly Defined.*

We should interpret the meaning of the word "knowingly" for just exactly what it states, no more and no less. "Knowingly" is defined in Cyc. as follows:

"With knowledge; intentional."

24 Cyc. 806.

Knowledge has been defined as

"The certain perception of truth; belief which leads to or results in moral certainty."

Webster's Dictionary.

"1. The state of being or having become aware of fact or truth; intellectual recognition of, or acquaintance with, fact or truth; the condition of knowing. 2. A perception, judgment or idea which is in accord with fact or truth; that which is known."

Century Dictionary.

"Knowledge signifies a being aware."

Wigmore on Evidence, section 300.

(b) *Erroneous View of Lower Court as to What Constitutes Knowledge Under the Statute.*

The Supreme Court of the territory of Arizona affirmed the judgment of the trial court, not upon any concrete evidence of knowledge found in the record, but predicated its decision upon the theory that "in criminal, as well as civil affairs, every man is presumed to know everything which he can learn upon inquiry, when he has facts in his possession which suggest the inquiry," and accepted this as the law and the test by which knowledge is to be determined in the case at bar.

This definition of knowledge is taken from the statement of Judge Nixon in directing the jury, in *U. S. v. Houghton*, 14 Fed. 545. Please note the facts of that case, which were: A collector of customs was indicted for presenting a false "padded payroll" to the secretary of the treasury, for the purpose of defrauding the United States. The payroll was signed by the defendant, which purported to be, and was, his act; he certified to its truth and presented the same for allowance. Upon the trial, he sought to defend on the ground that his deputy had prepared the payroll, and that he himself was ignorant of its falsity. He swore to the correctness of the payroll, and presented it for allowance to the secretary. A legal duty devolved

upon him to know, at his peril, that the statement to which he signed his name, and which he himself presented for allowance, was true and correct. *But does a legal duty devolve upon a corporation, at its peril, to place a sentinel over every subordinate agent, to stand guard and watch lest the agent deviate from the path of lawful conduct?* Judge Nixon's charge must be limited to the facts of such a case as that before him, and in such a case may be free from serious objection, but if sought to be extended to a case not involving like facts or a like situation, it becomes not only an absurdity, but a highly dangerous shoal, destructive to the innocent.

(c) *Construction of Similar Statutes by the Courts.*

If congress had intended to make ignorance or failure to make inquiry, where inquiry seems called for, tantamount to actual knowledge itself, it would have so provided, and imposed a penalty upon all those who "knowingly violated the act or, in the exercise of reasonable diligence, should have known of its violation," but the statute is positive, clear, and unambiguous. It punishes only a knowing violation. The lower court has wrongfully extended the act of congress beyond its plain meaning, and has judicially interpolated a limit in the statute which

is wholly at variance with the great weight of authority on this subject.

In *Yates v. Jones National Bank*, 206 U. S. 158, 51 L. Ed. 1002, at 1015, Mr. Justice White, in delivering the opinion of the court, laid down the rule, which "is clearly also established by previous decisions of this court," as follows:

"Where by law a responsibility is made to arise from the violation of a statute knowingly, *proof of something more than negligence is required*; that is, that the violation must, in effect, be intentional.

McDonald v. Williams, 174 U. S. 397, 43 L. Ed. 1022;

Potter v. U. S., 155 U. S. 438, 446, 39 L. Ed. 214, 217, and cases cited. See also

Utley v. Hill, 155 Mo. 232, 264, *et seq.*, 49 L. R. A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; and cases cited."

"The doing, or committing to do a thing knowingly and lawfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it."

Felton v. U. S., 96 U. S. 699.

"Knowing means knowledge of, mental assurance or *scienter*; it is *positive*, not *negative*."

State v. McBarron, 66 N. J. L. 680.

"The omission to inquire after knowledge, or negligence, does not prove or indicate the intention to commit a fraud."

Quinebaug Bank v. Brewster, 30 Com.
559.

Certainly, if negligence does *not prove or indicate an intention to commit a fraud, a fortiori*, it does not prove or indicate an intention to commit a crime.

To say that whatever puts a party on inquiry amounts, as a matter of law, to actual knowledge, provided the inquiry becomes a duty and would lead to actual knowledge of the facts, by the exercise of ordinary intelligence and understanding, is a legal fiction, and such knowledge is denominated, therefore, constructive knowledge and the law. It is a creature of law, and it is not only not actual knowledge, but the reverse of it.

Masterson v. West End N. R. Co., 5 Mo.
App. 64.

In Utley v. Hill, 155 Mo. 232, 55 S. W. 1091, 78 Am. St. Rep. 569, the court had occasion to construe the statute making directors liable for deposits received after insolvency, where such director "shall have knowledge of the fact that it is insolvent or in failing circumstances." In construing the word "knowledge," the court said:

"The word 'knowledge' here employed must be taken in its common acceptation; that is, in the plain, ordinary meaning of the word. It ought to be so construed that no man who is innocent can be punished or endangered. So treated, we may properly look to the source to which men generally apply for the meaning of the word 'knowledge.' Webster's Dictionary defines knowledge: '1. The certain perception of truth; belief which amounts to or results in moral certainty. 5. Information; intelligence; as to have knowledge of a fact.' The knowledge which the law requires that a director shall have had means a guilty knowledge, not an innocent one, *bona fide*, ignorance arising from neglect to keep posted or to inquire. It must be construed to have been intended as a sword with which to punish the guilty, and a shield to protect the innocent. If this had not been the intention, the liability would have been made absolute and unqualified, instead of dependent upon knowledge."

Employers of large numbers of laborers are in a similar position to directors of a bank. Just as directors are not expected, and cannot afford, to give their whole time to the business of the bank, likewise, an employer of a large number of common laborers is not expected, and cannot afford, to stand guard as a sentinel over every subordinate labor agent. The difference between the two exists in this, however, that the duty of the director, upon whose judgment and responsibility thousands of innocent de-

positors look to, is a much higher duty than any duty (assuming that there is any duty) upon the employer of a large number of laborers, to ascertain the prior history or the nationality of each of his laborers.

So summarized, the language of the statute of the Immigration Act of 1907 is plain and leaves no room for construction. Congress, by using the word "knowingly," meant exactly what the word "knowingly" in its common acceptation means, nothing more and nothing less, to-wit, actual knowledge. If congress had intended any different meaning than actual knowledge, it would have expressly provided that negligent failure to investigate facts which would lead to actual knowledge would be equivalent to knowingly violating the statute. By using the word "knowingly," therefore, congress designedly distinguishes between actual and constructive participation in, and assent to, the wrongful act, and distinguishes between actual or personal knowledge and imputed or constructive knowledge.

2. THERE IS NO EVIDENCE THAT A SINGLE ONE OF THE GOVERNING OFFICERS HAD ANY ACTUAL KNOWLEDGE OF THE ILLEGAL ACTS OF CARNEY AND THOSE ACTING UNDER HIM, OR HAD KNOWLEDGE OF ANY CIRCUMSTANCES FROM WHICH SUCH KNOWLEDGE COULD REASONABLY BE INFERRED.

The government, at the trial, attempted to show that, previous to the time of the importation of the forty-five laborers named in the complaint, Ruppellius had visited Hermosillo, Mexico, and gathered together a party of ninety laborers, and brought them to Nogales, Arizona, from which place they were shipped to the construction camps of the defendant company. The testimony of Mr. Ruppellius on this subject is as follows:

"During the fall, I made three or four trips, three, I think, to Hermosillo, Mexico. The first time I went, I saw several Chinamen merchants, and while there, I was asked to scatter the word that there was work in Nogales for laborers. I don't remember exactly what I did, but I spoke to Ramon Felix and told him. He went among the Mexicans to gather up some, and got a bunch of them together and came to Nogales. I came on the same train that they did. *I don't know who furnished the transportation.* I did not pay it, in a way I arranged for it. I went to the agent Monteverde, and told him there was a bunch of Mexicans in the car ready to go to Nogales for the purpose of asking for work at

Nogales, Arizona, from C. F. Holler & Co.
* * * I told one or two of them (the laborers) that if they were going to Nogales, to apply for a job with C. F. Holler & Co., and if there was a big crowd, not to go all together in a bunch to the office, for they had to pass or go through the immigration inspectors, or something like that. After they got to Nogales and applied for a job, they were to get transportation from Nogales to the end of the track from Grant Brothers or from W. W. Carney. I am sure of that. I think I told them that they would be sent by C. F. Holler & Co. to work for Grant Brothers on the grade. I don't remember having told them anything about furnishing transportation from Hermosillo to Nogales. I DON'T KNOW WHAT BECAME OF THE NINETY MEN. * * * My expenses for going to Hermosillo on these trips was paid by C. F. Holler & Co." [Trans. pp. 64, 65, fols. 138-141.]

"All the acts I did, and all the speeches and statements that I have testified to, I only made under arrangement with Mr. Carney." [Trans. p. 67, fol. 145.]

It is to be noted that Ruppellius was acting solely under and by virtue of the contract of C. F. Holler & Co. (of which he was a member), with Mr. Carney. *There is no evidence in the record that Ruppellius had any authority whatever, from any of the governing officers of the defendant Construction Company, to act in any capacity for it, either in employing laborers, or otherwise.* In fact, none of the governing officers of the Construction Company knew Mr.

Holler or Mr. Ruppellius, or those employed by him to gather laborers in Hermosillo, Mexico, until shortly before the time of the trial in the lower court. None of them had ever had any transaction with him or ever met him or ever knew him until that time. [Trans. p. 109, fol. 237; p. 111, fol. 243; p. 113, fol. 247; p. 114, fol. 248; p. 117, fol. 256.]

There is absolutely no evidence that the defendant Construction Company paid for the transportation for these men, or in any way arranged for it. The record is silent on this subject. Ruppellius stated:

"I don't know what became of the ninety men." [Trans. p. 65, fol. 140.]

Assuming, for the sake of argument, that these ninety men actually became a part of the working force of laborers used by the defendant Construction Company, that fact would not create the remotest suspicion that any of these men had been improperly secured. About five thousand laborers were employed by the Construction Company between August and November 1st of that year [Trans. p. 116, fol. 252], ninety per cent of whom were of Mexican descent. [Trans. p. 112, fol. 243.] These men had come from El Paso, Texas; Phoenix, Tucson, Bisbee, Nogales and other places in Arizona and New Mexico. [Trans. p. 116,

fol. 252.] Less than ten per cent of them came from Nogales, Arizona, to-wit, about four hundred and fifty to five hundred [Trans. p. 48, fol. 101; p. 112, fol. 243], for which the Construction Company paid Carney at the rate of a dollar a hundred, and refunded to him expenditures for meals en route in Arizona, at the rate of twenty cents per head. [Trans. p. 50, fol. 107.] Certainly the mere fact that these ninety men were of Mexican descent would not even excite suspicion that they had been improperly secured.

The evidence fails to show that these four hundred and fifty men had been improperly secured; and it is denied by Carney, the government's own witness, for Carney testified:

"I never authorized or assisted, in any shape or form, the inducing of Mexicans to come from Sonora into the United States." [Trans. p. 50, fol. 106.]

"I most positively say that I had never, before the 28th or 29th of October assisted, issued, or arranged for transportation, or caused to be arranged (transportation) for Mexican laborers from Hermosillo up to Naco, Nogales, Sonora. I do not recall that, in the latter part of September, C. J. Ruppellius brought a hundred men from Hermosillo, and that I arranged the transportation for them to Nogales, Sonora." [Trans. p. 57, fol. 123.]

We submit that, even had the government proven that the ninety men which Ruppellius

testified he secured from Hermosillo, Mexico, had actually been employed by the Construction Company, and that they were all of Mexican descent, it would not put the Construction Company upon notice or create the slightest suspicion that any of these men had been improperly secured. As has already been said, the antecedents, whence and whither, of the common laborers is not a matter of even idle curiosity to the large employer of labor. It had been represented to the Construction Company, and it is a fact, that Nogales, Arizona, is a good labor market. Mexicans were constantly floating back and forth seeking employment, and the appellant, being without any knowledge or notice whatever that such laborers had been improperly secured, had a perfect right to assume that its instructions had not been violated. The evidence does not even establish that the Construction Company failed to use ordinary care in exercising supervisory diligence over Carney.

3. THE LETTER OF CHARLES E. PEARCE, BOOKKEEPER AND PAYMASTER, SUGGESTING TO CARNEY THAT HE MAKE FUTURE SHIPMENTS OF LABORERS FROM NOGALES, ARIZONA, VIA NACO, ARIZONA, WAS BEYOND A REASONABLE DOUBT, NOT AUTHORIZED OR KNOWN TO THE CONSTRUCTION COMPANY, BUT WHOLLY WITHOUT THE SCOPE OF PEARCE'S EMPLOYMENT. EVEN IF SUCH LETTER HAD BEEN AUTHORIZED, IT DID NOT CONTEMPLATE OR AUTHORIZED ANY VIOLATION OF THE IMMIGRATION ACT.

(a) *The letter from Pearce to Carney was wholly unauthorized, not known to the Construction Company, and wholly without the scope of Pearce's employment as a matter of law.*

The letter referred to, solely by reason of which Carney testified that he had been instructed to ship via Naco, was a letter of a man signed "Pearce." Carney testified:

"The instructions I refer to I received in a letter from a man signed 'Pearce.'" [Trans. p. 58, fol. 125.]

Prior to the receipt of the Pearce letter, all laborers had been shipped

"From Nogales, Arizona, to Benson, on the Southern Pacific Railroad, from Benson transferring them on to the regular main line of the

Southern Pacific to Cochise, and then down on the little road from Cochise to Pearce, and to the grade, all in Arizona." [Testimony of Carney on direct examination, Trans. p. 58, fol. 124.]

This was entirely proper and lawful.

In order to explain what letter Carney referred to, the defendant, on cross-examination of Carney, identified the letter of Pearce, which was introduced in evidence as defendant's exhibit "II." [Trans. p. 134, fol. 290.] It is as follows:

"Courtland, 10/23.

W. W. Carney, Nogales.

Dear Sir: As it is slow and expensive getting men in by Kelton, and as the most work is near Naco, we think that you had better ship to that point; see if you cannot provide the men with some kind of a card or paper from the immigration office that will allow them to cross the line at Naco. They can easily walk 8 miles to our first camp.

Yours truly,

(Stamp) GRANT BROS. CONSTRUCTION CO.

By C. E. P.

(Stamped):

Received

October 26, 1909,

Office of

Forwarding Agent."

(b) *The testimony as to the authority of Pearce to write this letter is undisputed and without conflict, and cannot possibly lead to but one inference, that inference being a total want of*

authority in the writer to employ laborers or to write such a letter.

The testimony of Pearce is as follows:

"I reside at Los Angeles. I am a *bookkeeper and paymaster*, and held that position in October, 1909, for Grant Bros. Construction Company, at that time in the territory of Arizona, in connection with the building of a line between Kelton and Naco, Arizona, for the Arizona and Colorado Railroad. * * * I was bookkeeper and paymaster in connection with that Kelton work, from the commencement up to about the completion. My duties as bookkeeper and paymaster, particularly with reference to the men, is keeping track of the men. I kept the books and paid off the men. On that work * * * I wrote the letter marked defendant's exhibit 'II,' for identification, on October 23rd. I received no reply to that letter from Mr. Carney or anybody else. (Letter introduced in evidence by the defendant and admitted and marked defendant's exhibit 'II,' and read to the jury.) No one directed me to send that letter. I WAS ACTING ON MY OWN MOTION, AND SENT IT FOR THE REASON THAT I STATE IN THE LETTER. * * * No laborers were sent as the result of those instructions that I know of, but I don't know. I am the bookkeeper and attended to paying off the men. I did not pay W. W. Carney for seventeen of those men sent under those instructions. I don't know whether or not he was paid by the company. * * * I never was an officer of Grant Bros. Construction Co., only an employee. On that letter, the letters 'Grant Bros. Construction Co.' were printed in red with a stamp which was in my custody. Whenever, IN MY DUTIES, I had to

sign Grant Bros. Construction Co.'s name, I used that stamp. It was always recognized." [Trans. pp. 115, 116, fols. 251-253.]

The court then asked the witness several questions, as follows:

"Q. Was it, or was it not, a part of your duty, Mr. Pearce, to look after the laborers and supply of labor out there?

"A. NONE WHATEVER. While in my position as bookkeeper, the correspondence back and forth came to me, and Carney would write that he had so many men to ship, or I, at the solicitation of the superintendent, would write to order the men.

"Q. Who was the superintendent out there?

"A. Mr. Taylor.

"Q. Did Mr. Taylor direct you to write this letter?

"A. He DIDN'T direct me to write that—NO. I wrote that letter for the reason that I gave in the letter, I thought it was a good idea—ENTIRELY MY OWN INITIATIVE. It occurred to me it would be a good scheme, and I submitted it to Mr. Carney, as Mr. Carney was shipping men to us." [Trans. pp. 116, 117, fol. 254.]

A bookkeeper and paymaster is merely a ministerial agent of his principal; he has no discretionary power to bind his principal. He cannot bind his principal even civilly, except in matters which form a part of his employment. The writer of this letter exercised absolutely no power to hire or discharge laborers, and the evidence shows that his scope of authority commenced and ended with his books. This letter

was "entirely of his own initiative"; it lacked the authority and consent of the Construction Company. He "thought it was a good idea," and believed that a saving could be effected by avoiding the roundabout route via Benson to Cochise, Arizona, to the camp.

There being absolutely no evidence in the record that any of the governing officers of Grant Bros. Construction Co., or anyone in authority authorized, had any knowledge, or any notice of this letter, and that it was wholly outside of Pearce's authority to write such a letter, only one inference can be drawn from the evidence, that inference being that the book-keeper had absolutely no authority to write the letter. We respectfully submit that the defendant Construction Company could not be charged with any penal responsibility for such a letter, even though the letter had contemplated the doing of an illegal act by the person to whom it was addressed.

"If only one inference can be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide." (Italics ours.)

Washington Gas Light Co. v. Lansden,
172 U. S. 545.

(c) The letter of Pearce to Carney did not contemplate that Carney should do an illegal act. The letter is complete in itself. It can be

read between its four corners. No extrinsic facts and circumstances need be resorted to in its interpretation; wherefore, the parole evidence rule, a rule of substantive law, removes the interpretation of the letter from the consideration of the jury. The writer did not intend doing an illegal act, and

“What the parties intended by the language employed—was a matter of law for the court, and not a question for the consideration of the jury.”

Brown v. Schiappacasse, 115 Mich. 47.

“As a rule, both in civil and criminal cases, cases of liability, to some extent excepted, writings are to be expounded by the court. Wherever a paper can be understood from its own words, its interpretation is a question of law for the court.”

State v. Patterson, 68 Me. 474.

As a *matter of law*, the letter did not contemplate the doing of an illegal act. Pearce had knowledge that Carney was shipping men from Nogales, Arizona, to the construction camps of the defendant. That is the extent of his knowledge, and no more can be inferred, for he says in the letter:

“See if you cannot provide the men with some kind of a card or paper from the immigration office that will allow them to cross the line at Naco.”

This statement can only mean that Pearce assumed that the men to be shipped were in Nogales, Arizona, lawfully there, and entitled to re-enter the United States at Naco, Arizona, though shipped through Mexican territory. What sort of a card is contemplated in that letter? There can be but one answer, and that is, a card showing that the men were lawfully in the United States and entitled to re-enter at Naco, for such a card "will allow them to cross the line at Naco."

There is no doubt but what Carney, having previously thereto made all shipments from Nogales, Arizona, and Pearce, having been present at the time that Angus Cashion made the contract with Carney, assumed that the laborers had been secured in Nogales, Arizona, were lawfully in the United States, and that they had the right to re-enter the United States at Naco, and that Carney should provide them with the evidence of that right, a card, before they left that place. That such a course as contemplated by the bookkeeper was proper and legal, is shown in the record, for with the forty-five laborers involved in this case were also seventeen laborers secured in, and shipped from, Nogales, Arizona, via Mexico, to Naco, and these seventeen men were allowed to enter the United States, after being questioned by the immigration officers and the board of special

inquiry. Here we have an unqualified recognition and approval by the proper officers of the immigration service of the propriety and legality of such a course. [Trans. p. 43, fol. 92; p. 58, fol. 125; p. 58, fol. 128.] All of these men had previously passed through the immigration office at Nogales, Arizona. [Trans. p. 61, fol. 132.]

The practice of the immigration officials, relative to laborers being shipped from Nogales, Arizona, as stated by witness Holler, who "knew something about the labor law," and the members of the immigration service, testified:

"If the laborers were Mexicans, before they could go out of town, of Nogales, Arizona, with transportation of the company, they had to go and register, or give a statement of some kind, in the immigration service. They would not allow a man to go out on the train if he had not presented himself at the immigration office, even when we were sending them by Benson." [Trans. p. 68, fol. 146.]

Carney understood what was meant by the language used in Mr. Pearce's letter to ship via Naco, for he testified:

"I had instructions to ship the men that way. (Via Naco.) I had no instructions to ship them from Hermosillo (Mexico) to Lomas (Mexico), and from Lomas into Naco. The instructions I had was to ship men for the work in Courtland (Arizona) via Naco (Arizona), and not around by Cochise and Pearce (Arizona). * * * The reason for the instruction to ship the men from Nogales, Arizona, to Naco, was because the men had gotten within seven miles

of Naco, and to ship the men from Nogales, Arizona, around to Naco (would be cheaper and quicker), for the simple reason that the men could leave Nogales, Arizona, in the morning, and could be in the camp that night. * * * At this time, Grant Bros. Construction Co. were constructing a railroad in Cochise county, throwing up embankments, and making railroad cuts, getting the road bed ready for the rails. I think they started at Pearce. The objective point or terminus was Naco, Arizona. This was between Bisbee and Douglas, headed for Naco, Arizona. * * * The instructions that I speak of was to the effect that I was to discontinue sending men over that route in Arizona, and to send them through Mexico from Nogales, Arizona, or Nogales, Sonora, to Del Rio, a junction station on the new road in Mexico on the old Cananea, Yaqui River & Sonora line, and from there on the old line to Naco. From the time they left Nogales, Arizona, until they arrived in Naco, Arizona, they were all the time in Mexico. Grant Brothers did not furnish me the transportation, and no instruction was given me as to what transportation I was to use in sending them through Mexico. Nothing was said about transportation. Under the contract I had with Grant Brothers, they were to furnish the transportation from Nogales, Arizona, to the work." [Trans. pp. 57, 58, fols. 123, 124.]

We therefore respectfully submit that there is no evidence on the subject which could warrant the inference that this letter authorized Carney to assist, encourage, or solicit, or even talk to, or pay the transportation of any laborers in Mexico to Naco; but the only possible

inference is that such letter contemplated shipments from Nogales, Arizona, of laborers who had been lawfully employed at that point, through Mexico, via Naco, there being no direct railroad line from Nogales, Arizona, to Naco, Arizona. That even if such letter from Pearce, the bookkeeper, had authorized Carney to secure laborers from Mexico and ship them to the United States via Naco, there can be only one inference from the undisputed testimony, and that is that such letter was unauthorized and unknown to any of the governing officers of the Construction Company, and that therefore such letter cannot possibly render the Construction Company criminally liable in this action.

4. CARNEY WAS AGAIN INSTRUCTED BY THE CONSTRUCTION COMPANY NOT TO SECURE LABORERS FROM MEXICO OR TO EVEN TALK TO LABORERS IN MEXICO, ON ABOUT OCTOBER 26TH, AND JUST A FEW DAYS PRIOR TO THE ARRIVAL OF THE FORTY-FIVE LABORERS NAMED IN THE COMPLAINT.

The testimony as to the substance of these instructions is uniform and undisputed, and shows conclusively that they were given in absolute good faith, with the expectation that they would be rigidly adhered to. *There is absolutely no evidence in the record that they were not given in absolute good faith, and in the*

absence of such evidence, the law presumes that they were *bona fide* instructions.

Carney himself, the government's own witness, admits the giving of these instructions. He testified:

"I know Mr. James Cashion. He is general head of Grant Bros. Construction Co., and I also know Mr. Burton. I remember seeing them in Nogales, Arizona, about October 25th, 26th or 27th, 1909, some days prior to the shipment of these men to Naco. I received instructions from Mr. James Cashion upon that occasion. He had been east, and I told him I was getting laborers. He said: 'Where are you getting them from?' I said: 'I am getting them from Arizona,' and he talks pretty rough sometimes, and he went after me and says: '*Now, don't you do anything, by God, Carney, that you ought not to do; don't you go into Mexico for a single man.*' He told me I must not go out of Arizona for anybody, and emphasized it very strongly indeed. I think Mr. J. E. MacLean and Mr. Burton were present." [Trans. pp. 55, 56, fols. 119, 120.]

The testimony of Mr. James Cashion on this subject is:

"I am acquainted with W. W. Carney; I saw him some time in October, 1909, in front of the Montezuma Hotel in Nogales, Arizona. Mr. J. A. Burton and Mr. MacLean were present. I think MacLean's initials are E. J. At that time, I had a conversation with Mr. Carney relating to the hiring of Mexican laborers to work on the road in Arizona. *This conversation was in the evening of the 25th of October.* I gave Mr. Carney instructions at that time.

My first knowledge of Carney furnishing us laborers at all was that particular evening. Mr. Carney said: 'I am sending a good many men to your work at Kelton.' When he made that statement, I immediately asked him where he was getting those men. He says: 'Here in Nogales.' I said: 'Do you mean on the American side?' He says: 'Certainly.' 'Now,' I says to him, 'You want to be sure that you get them on the American side. We don't want you to get a man on the Mexican side; we don't want you to offer any inducements of any description, and I further instruct you not to even talk to a man regarding labor on the Mexican side.' My instructions were positive." [Trans. p. 110, fol. 241.]

Mr. John A. Burton was present at this conversation, and his testimony of what occurred is almost identical with the testimony of Mr. James Cashion. Even at the expense of quoting testimony that is merely cumulative and undisputed, we quote from Mr. Burton's testimony as follows:

"I was present at a conversation between James A. Cashion and W. W. Carney at Nogales, Arizona, in October, 1909, Mr. J. E. MacLean was also present. In that conversation, Mr. Carney told Cashion that he was sending men over to Courtland to work, and Cashion said to him: 'Where are you getting these men?' and he says: 'At Nogales.' 'Nogales, Arizona?' Cashion said. He said: 'Yes,' and Cashion then said to him: 'I want you to get them at Nogales, Arizona, and not across the line, and DON'T TALK TO A MEXICAN ON THE MEXICAN SIDE OF THE LINE.' I said further

to Carney that I didn't think that these men were worth one thousand dollars apiece to us, and he must be careful about that. At the request of Mr. Cashion, I had come from Los Angeles to meet him at Nogales to figure on the contract with the Southern Pacific Company; that was the occasion of our being there." [Trans. p. 113, fol. 246.]

The only other person present at this conversation was Mr. J. E. MacLean, who was assistant superintendent of the Sonora Railway and S. P. of Mexico, living in Nogales, Arizona, and a disinterested witness. [Trans. p. 114, fol. 249.] His account of what occurred on this subject is:

"I am acquainted with James Cashion, W. W. Carney and Mr. Burton. On October 25th, 1909, I was with these gentlemen at Nogales, Arizona. On that day, I was present at, and heard a conversation between Mr. Cashion and Mr. Carney. Mr. Carney, Mr. Burton, Mr. Cashion and myself were standing in front of the Montezuma Hotel in Nogales, Arizona. Mr. Carney told Mr. Jim Cashion that he was sending men to work upon the grade on the line from Courtland to Naco. Mr. Cashion asked him where he was getting those men. He said: 'I am getting them here in Nogales.' Mr. Cashion said: 'On the American side?' and Carney replied: 'Yes.' Mr. Cashion said: 'WELL, NOW, YOU BE SURE TO GET THEM ON THE AMERICAN SIDE. UNDER NO CIRCUMSTANCES OFFER THEM ANY INDUCEMENT TO GO ACROSS THE LINE, OR EVEN TO GO ACROSS THE LINE TO TALK TO THEM.' " [Trans. p. 144, fol. 249.]

5. CERTAIN REMOTE MINOR CIRCUMSTANCES
ADVANCED BY GOVERNMENT IN LOWER
COURT IN A DESPERATE ATTEMPT IN THE
EVIDENCE TO SUPPORT A FINDING OF
KNOWLEDGE.

There are several very minor and remote circumstances in the record which the government in its argument before the territorial court relied upon to prove knowledge on the part of the Construction Company of the illegal acts of Carney and those acting under him. We shall mention these but very briefly, as it is apparent at first glance that they are without substance *and without merit for such purpose.*

(a) The government points to the *open manner in which Ruppellius told laborers in Hermosillo that they were to be employed in Nogales, Arizona, for Grant Brothers Construction Company.* It is at once apparent that unless some of the governing officers were present at such times, and there is no evidence in the record that any of them were, such facts, even though true, would have no potency to prove knowledge, or would never reach the ears of anyone of the managing officers of the Construction Company.

(b) Counsel also stated that *nearly all the laborers knew the name of the company they were to work for.* Granting that this is true, of what force is such a fact to prove knowledge

on the part of any of the governing officers of the defendant Construction Company unless it is shown (which has not been done) that they were informed by someone authorized so to do by the defendant Construction Company?

(c) *The letters and telegrams from Carney to the immigration officials, to-wit: [plaintiff's exhibits 5, 6 and 7, Trans. pp. 130-131], likewise, have no force whatever, and do not even remotely tend to prove that Grant Brothers Construction Company had any knowledge of the contents of such letters and telegrams, upon which subject there is absolutely no evidence, and clearly as declarations of Carney, they are not competent to prove Carney's authority to write the letters, for an agent's authority cannot be proven by his own declaration, and the evidence shows that Carney had absolutely no authority from the defendant Construction Company to write such telegram and letters, without which authority such letters are not binding upon the defendant company. Furthermore, if the court will carefully read the telegram and two letters referred to, there is nothing on their face to indicate an intention to violate the Immigration Act, but on the other hand, the letters indicate a strict observance of the requirements of the immigration service, and contemplate that every man sent by Naco, should pass through*

the immigration office. Carney, in fact, deceived the immigration officials, as he had also deceived Angus Cashion and James A. Cashion, for he stated that there would be seventy men coming from Nogales, Arizona, through Mexico to Naco, Arizona, and the record shows that but seventeen or nineteen in reality left Nogales, Arizona, which, together with the forty-five laborers picked up in the car at Lomas, Mexico, would make approximately a number which Carney stated would arrive. The letter was designed to lead the immigration authorities to believe that the forty-five men who were in the car at Lomas, Mexico, were to be shipped from Nogales, Arizona. We, therefore, submit that the telegram and two letters to the immigration officials at Naco, Arizona, are without any aid whatsoever to the government in its hopeless task of proving even a scintilla of notice to the defendant Construction Company of the alleged illegal acts of Carney and those acting under him.

(d) *As to the passes, over railroad lines in Mexico*, we have shown elsewhere in this brief (pages) that they were issued without any authority and without the knowledge of the defendant Construction Company. There is absolutely no evidence in the record that would tend to prove that they knew of the issu-

ance of these passes, or that any laborers had been secured at all from Mexico.

(e) The counsel for the government also urged that the fact that *Angus Cashion and Mr. James A. Cashion have been engaged in the grading business in Mexico and Arizona for years prior*, and having a knowledge of labor conditions should have known of the alleged illegal acts of Carney and those acting under him. We fail to see how a knowledge by the two Cashions mentioned of labor conditions *previous* to the making of the contract with Carney can have any force or efficacy in proving knowledge of acts performed by Carney *subsequent* to the making of the contract. There is absolutely no evidence in the record that they had any knowledge that laborers were during such years, being *illegally* imported or induced to migrate from Mexico into the United States, or that such was the fact. To draw an inference of knowledge on such a basis, even without considering the positive denials of knowledge by the two Cashions, the court would necessarily have to enter into the field of conjecture, which it would be unjust for any court or jury to do.

(f) The government points out that *Randall, a former employee of the Construction Company*, was hired by Carney and Holler to take the men in charge from Lomas, Mexico, to

Naco, Arizona. Again, we fail to see, granting the truth of such a statement, how it can have any force whatever in supporting or tending to support an inference that Grant Brothers Construction Company had any knowledge of Randall's employment by Carney. Randall was paid by Carney [Trans. p. 104, fol. 226], and not by the Construction Company, and there is absolutely no evidence in the record that anyone in authority representing the defendant Construction Company knew anything at all of Randall's employment or of his acts for Carney. He had previous to that time been discharged by the Construction Company, and was in no way connected with it. [Trans. p. 102, fol. 223.]

(g) The government in the lower court pointed to the circumstance that *D. R. McDonald*, a kind of roustabout [Trans. p. 48, fol. 103] employed by the Construction Company, *was in Naco, Arizona, at the time of the arrival of the forty-five men named in the complaint.* He had been sent to Naco with instructions from W. T. Taylor, general foreman of the defendant's camps, "with instructions to load a stove and from there to go to Bisbee with Mr. Abrahams in a buggy" * * * to see what carts and harness there was for sale, which

McDonald did. [Trans. p. 117, fol. 255.] Mr. Taylor testified:

*"I received no information from W. W. Carney or anybody else, and had no knowledge that forty-five laborers or seventeen laborers, or any laborers were going to be in Naco, on October 27th, 28th, 29th or 30th, 1909. I did not know at any time Luis Sanchez, Ramon Felix, Gustavo S. Randall, C. F. Holler, or C. J. Ruppellius. * * * Prior to October 29th, I had not heard from or been communicated with by W. W. Carney with respect to transmission by him or under him or any laborers to Naco for our camp, and had not received any word or communication whatever from Luis Sanchez, Ramon Felix, Gustavo S. Randall, C. J. Ruppellius, or either of them, and had no knowledge whatever that any number of laborers had been secured anywhere in Mexico for the work of the defendant company in Arizona. * * * Mr. D. R. McDonald was not a sub-foreman nor camp foreman, and occupied no position by virtue of which he could employ or discharge men."* [Trans. pp. 117-118, fols. 255-257.]

This statement of Mr. Taylor is corroborated by McDonald, who testified:

"I know Mr. Taylor, the foreman of the Grant Brothers works there. On the morning of the 27th of October, 1909, he told me to go to Naco, and get a range out of Norman Cook's Warehouse, and ship it to one of the camps, and also to go to Abraham's and get a team and go to Bisbee to look over the carts and harness. Under these instructions, I went to Naco. I had no knowledge at all and did not know that any Mexicans were coming from Lomas or Her-

mosillo, Mexico, to Naco. * * * *I do not know how Mr. Carney knew that I would be at Naco on that very day.*"

We submit that even if Mr. Taylor and D. R. McDonald knew that Carney expected to ship some laborers via Naco at that time, that they had a right to rely upon the laborers' having been properly employed by Carney at Nogales, Arizona, pursuant to his contract. There is absolutely no evidence in the record that McDonald or Mr. Taylor knew that these men had been secured from Mexico, but on the contrary, as shown by the above extracts from their testimony, such is positively denied. In the absence of any evidence to the contrary, these denials must be conclusive.

H. There is No Evidence in the Record that Defendant Construction Company Furnished Conveyance or Transportation to Any of the Forty-five Laborers Named in the Complaint or Paid or Caused to be Paid the Expenses of Any of Said Laborers From Mexico Into the United States.

1. *There is no evidence that the defendant Construction Company itself furnished conveyance or transportation, or paid any of the expenses of said laborers from Mexico to the United States. The contract of the defendant Construction Company with the railroad pro-*

vided that the Construction Company should have free transportation for common laborers only from points within Arizona and New Mexico to its construction camps in Arizona. [Trans. p. 134, Defendant's Exhibit No. 1.]

Mr. J. C. Vinson, auditor of the railroad lines operating in Mexico, over which the forty-five aliens mentioned in the complaint traveled, testified:

"The contracts in effect at that time with Grant Brothers did not provide for furnishing such a pass as this. I have some of the original contracts here. At the time mentioned in October, there was no arrangement with Grant Brothers for the issuance of passes such as plaintiff's exhibit 'A.'" [Trans. pp. 68, 69, fol. 148.]

He further testified:

"The record in our office shows that the amount for which these passes stand (referring to the passes upon which said laborers rode from Hermosillo, Mexico, to Naco, Arizona) was not billed against Grant Brothers, but was handled in a book arrangement by crediting to passenger revenue, and debiting to reconstruction job at one cent per mile." [Trans. p. 65, fol. 149.] "As far as my knowledge goes, this (defendant's exhibit '1') is the only contract in force at that time respecting the execution of any work in the territory of Arizona. * * * These passes were not issued by virtue of the contract of August 10, 1909, between the Arizona and Colorado Railroad Company and the defendant. * * * THESE PASSES WHICH HAVE BEEN INTRODUCED IN EVIDENCE WERE NOT CHARGED ON

OUR BOOKS AGAINST GRANT BROTHERS CONSTRUCTION COMPANY NOR DID THEY PAY FOR THEM IN ANY MANNER." [Trans. p. 71, fols. 155-156.]

The auditor of said Mexican railroads further testified that when a pass came in marked charge to the account of Grant Brothers Construction Company or any similar memorandum, that it would in no event "be charged or entered into an account of the company with the Construction Company." [Trans. p. 73, fol. 158.] Carney himself testified:

"Grant Brothers did not furnish me the transportation." [Trans. p. 58, fol. 124.]

As to the expenses, there is absolutely no evidence that any of them was paid by the defendant Construction Company. Carney testified:

"The feeding of the men while staying over night in the car at Lomas, Mexico, was paid by Carney, and Holler. They have never been reimbursed and did not expect to charge that to Grant Brothers Construction Company. For they had no contract to handle any men in Mexico, in Sonora." [Trans. p. 53, fol. 114; p. 61, fol. 131.]

The expenses of Randall, who was employed by Carney and Holler to take charge of the men from Lomas, Mexico, to Naco, were paid by Carney, who

"never made any charge of the \$5.00 to the defendant Construction Company. It was a

voluntary contribution. * * * My contract with Grant Brothers said that they would pay the expenses in Arizona; they had nothing to do with Mexico." [Trans. pp. 54, 55, fols. 117, 118.]

The expense of C. J. Ruppellius of Holler & Company in securing and gathering together the laborers in Mexico through the services of Luis Sanchez and Ramon Felix, who were employed by Ruppellius, were paid by C. F. Holler & Company. [Trans. p. 64, fol. 139; p. 65, fol. 141; p. 66, fols. 142-143; p. 90, fol. 196.]

As to the expense of feeding the men in Naco, Arizona, after they had crossed the line and during the hearing before the immigration officials, Mr. Burnett, immigration inspector and witness for the government, testified that one D. R. McDonald

"came and asked permission to take the men, then before the board, to a restaurant to feed them. We granted the permission to feed the men shown in the photographs [plaintiff's exhibits 3 and 4, Trans. p. 130], and accompanied him to the restaurant. I asked him who was to pay for it and he said Grant Brothers Construction Company when he should present his bill." [Trans. p. 59, fol. 127.]

There is no other evidence on this subject and consequently no proof that D. R. McDonald ever presented his bill or that Grant Brothers Construction Company ever paid the expense of feeding these men at Naco, Arizona. Further-

more, feeding the men in Arizona after they had crossed the international boundary line and were already in the United States could not be said to be "assisting" the men in coming from Mexico, to Naco, Arizona, for at that time they were already within Arizona. Such a contention is ridiculous, absurd, and not worthy of consideration.

(2) *There is no evidence in the record that the defendant Construction Company caused to be furnished conveyance or transportation to any of the forty-five laborers named in the complaint or caused to be paid the expenses of any of said laborers from Mexico into the United States.* There is no doubt in our minds as to how the transportation over the railroads in Mexico was arranged. The railroad companies of Mexico, by whom Carney was employed, reposed a great deal of confidence and trust in Carney, and in order to facilitate the speedy shipment of supplies by Carney, as the railroad's forwarding agent in the engineering department, furnished him with the book of passes over its railroad, and these passes Carney, not only in violation of the trust and confidence reposed in him, but also in violation of the specific and positive instructions of the defendant Construction Company, used to further his own private gain, without the knowledge of either

the railroad company or of the defendant Construction Company.

Carney testified as follows:

"At that time I was and had been for five years general forwarding agent for the Southern Pacific Railroad Company of Mexico. In that capacity, the company had furnished me with a book of passes, and this pass that was introduced in evidence here came to me from the Southern Pacific Railroad Company of Mexico under my arrangement with them. It did not come at all from Grant Brothers Construction Company. * * * The book of passes from which I took this pass in this case was one of the general Southern Pacific passes sent me for the furthering of the Southern Pacific Railroad Company's work in Mexico. * * * No members of Grant Brothers Construction Company ever told me to use those passes. * * * I did not inform any member of that firm at all that I was going to use those passes for that purpose, and no member of Grant Brothers Construction Company knew that I was going to so use them. * * * Grant Brothers knew nothing about the transaction. They had no means of knowing. * * * In the instructions I received from Jim or Angus Cashion, or from Grant Brothers Construction Company, I was not directed to use this Mexican transportation in sending men through Mexico from Nogales, Sonora. * * * Grant Brothers did not furnish me the transportation, and no instruction was given me as to what transportation I was to use in sending them through Mexico. * * * Under the contract I had with Grant Brothers, they were to furnish the transportation from Nogales, Arizona, to the work." [Trans. pp. 55-58.]

Carney, as forwarding agent for the Mexican railroad, had offices next to the dispatcher, and gave and requested the dispatcher to issue orders for the movement of the car containing the forty-five laborers from Lomas, Mexico, to Naco, Arizona. In doing so there is no doubt but that he abused his capacity as a trusted official of the railroad company to further his own greedy ends, in violation of his positive instructions from the Construction Company.

Mr. Bennett, one of the conductors who handled the car from Lomas, Mexico, to Naco, Arizona, testified:

"In handling laborers, it frequently occurs that we are instructed by someone in authority to pick up a car of laborers and take it from one place to another and get transportation later to avoid delay. * * * Any instructions I may have had about that car from Del Rio to Naco, must have come from the railroad company, and only from them."

In conclusion we submit that there is not a scintilla of evidence in the record from which any sane, reasonable man could possibly draw the inference that the defendant Construction Company or any of its governing officers caused to be furnished any conveyance or transportation, or caused to be paid any of the expenses of the laborers mentioned in the complaint from Mexico to the United States. On the contrary, the evidence is conclusive, and only one infer-

ence can be drawn from it, namely, that Carney and those acting under him, acted without any authority whatsoever from defendant Construction Company or any of its governing officers and contrary to the positive and specific instructions of the Construction Company and also in flagrant abuse of the trust and confidence reposed in him by the railroad companies of Mexico by whom he was employed, for his own greedy and pecuniary ends. The government's testimony on this subject is wholly "without substance," has no merit, and as said by the court in 108 Fed. 37, 45, is like "a spark, which arrests attention and then from mere lack of vitality, fades away." The government's evidence is so meagre, "so un consequential," "as not to furnish a reasonable foundation on which a verdict could rest," involving a finding that the defendant Construction Company ever in any way directly or indirectly paid or caused to be paid any of the transportation or expenses of the forty-five aliens mentioned in the complaint from Mexico to the United States.

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IV.

THERE IS NO EVIDENCE WHATEVER THAT THIRTY-FIVE OF THE LABORERS NAMED IN THE COMPLAINT WERE ALIENS, AND, THEREFORE, ON THIS GROUND ALONE, THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE VERDICT AS TO THIRTY FIVE COUNTS OF THE COMPLAINT.

- A. Proof of the Alienage of Each and Every of the Forty-five Laborers Named in Each of the Forty-five Counts Respectively of the Complaint was Essential Under the Statute.**

This is so apparent and self-evident that its mere statement without argument or citation of authority is sufficient. The statute imposes a penalty only for knowingly assisting, etc., the migration or importation of "alien" contract laborers. If they were not "aliens" there can be no penalty. The burden was on the government to prove each and every element of the statutory offense. Proof of the alienage of each laborer was essential to sustain a verdict on each count.

Alienage is not to be presumed.

The mere fact that the laborers were of Mexican descent is no proof that they were born in Mexico, any more than that they were born in Arizona, or Cuba, or some other country, a large number of whose citizens are of Mexican descent.

B. There is No Evidence that the Laborers Named in Counts 1, 3, 4, 5, 7, 9, 10, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 37, 40, 41, 42, 43, 44, 45 were Ever Aliens, and the Motion of the Defendant to Instruct the Jury to Return a Verdict for the Defendant Company as to Those Counts Should Have Been Granted.

This motion was *separately* made as to each and all of the above named counts at the close of the government's case. [Trans. pp. 105, 106.] These were the counts in which the laborer named did not testify either personally in court or by deposition. [Trans. p. 106, fol. 223.] The motion was denied, to which ruling the defendant excepted [Trans. p. 106, fol. 223], and which ruling is now assigned as error. [Eighteenth Assignment of Error, Trans. p. 161.]

The following witnesses gave their depositions, which were read in evidence over defendant's objection based on the fact that *no notice was given defendant thereof*, as heretofore stated:

Alberto Ruiz, count 36. [Trans. pp. 79-81.]

Manuel Escobosa, count 11. [Trans. pp. 81-83.]

Jesus Guevarra, count 17. [Trans. pp. 83-85.]

Manuel Tona, count 38. [Trans. pp. 86-87.]

If the court sustains our motion to suppress

those depositions *for lack of notice to defendant thereof*, as heretofore urged in this brief, then *as to those counts also the case must be reversed on this ground alone.*

The following laborers were arrested at Nogales and detained by the government as witnesses pursuant to the statute, and each personally testified that he was born in Mexico and was still an alien:

Francisco Corrales, count 8 [Trans. pp. 91-95].

Ricardo Lopez, count 23 [Trans. pp. 95-97].

Nicholas Casteneda, count 6 [Trans. pp. 97-99.]

Jose Acuna, count 2 [Trans. pp. 99-101].

Abelardo Torres, count 39 [Trans. pp. 101-102].

Gumercindo Portillo, count 32 [Trans. p. 102].

V.

THE SUPREME COURT OF ARIZONA COMMITTED GROSS ERRORS IN SUSTAINING THE ACTION OF THE TRIAL COURT IN THE GIVING AND REFUSING INSTRUCTIONS TO THE JURY, BY REASON OF WHICH THE VERDICT WAS WRONGFULLY RENDERED.

- A. The Jury were Wrongfully Instructed to Find for the Government and Against the Defendant. If They were "Satisfied," or if They "Find," or if They "Believe" From the Evidence or if They Find Some "Circumstance which Would Warrant the Inference" that the Defendant Company was Guilty of the offense Charged Against It, the Jury Should have been Instructed that the Government Must Prove Each and Every Essential Element of Its Case "Beyond a Reasonable Doubt." [See 9th, 10th, 14th Assignments of Error, Trans. pp. 158-160.]

"A reading of these sections" (sections 4 and 5 of the Immigration Act of 1907) "makes it apparent that the act makes it a *misdemeanor* to assist or encourage the importation of contract laborers."

United States v. Stevenson, 215 U. S. 190.

This court held in that case that the statutory penalty provided for in section 5 of the act could be recovered by an action, civil in form, for the

penalty, or by an indictment for the penalty. In either case the facts required to be proved are the same. In either case the penalty is recovered as a punishment for a criminal offense, a misdemeanor. Why should the form of the action change the degree of proof required? If the penalty can be recovered by indictment requiring proof of guilt beyond a reasonable doubt, certainly the government, in order to accomplish the same end, by the route of an action civil in form, should be compelled to make the same degree of proof. As said by Mr. Justice Field in *United States v. Choteau*, 102 U. S. 611, 26 L. Ed. 245:

"Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.
* * * To hold otherwise would be to sacrifice a great principle to the mere form of procedure."

The only appellate federal court which has passed on the degree of proof required in an action to recover the penalty under this statute has twice decided that "*the evidence must satisfy the jury beyond a reasonable doubt that defendant was guilty of the offense charged.*" The first case was decided in November, 1910 (five

months after the trial of this case), by the Circuit Court of Appeals, Second Circuit, in the case of *Regan v. United States*, 183 Fed. 293, and we invite the attention of the court to the following extract from the well considered opinion in that case, wherein the authorities are reviewed:

"Over 30 years ago the Supreme Court held that, in an action brought by the government to recover penalties for alleged frauds upon the revenue, the burden rests upon the government to make out its case beyond a reasonable doubt. The statute in that case (section 48, c. 173, 13 Stat. 240, Act June 30, 1864) provided that any person who shall have in his custody or possession any distilled spirits, subject to duty, for the purpose of selling the same with the design of avoiding payment of the duties imposed thereon, shall be liable to a penalty of \$500 (*Chaffee v. U. S.*, 18 Wall. 518, 21 L. Ed. 908). There seems to us to be no difference in substance between the provision that one 'shall forfeit and pay' and the provision that one 'shall be liable to a penalty.' That the act charged to have been committed by defendant in the case at bar was a crime is indisputable. The statute expressly makes it a misdemeanor.

"In *Lilienthal's Tobacco v. United States*, 97 U. S. 271, 24 L. Ed. 901, it was pointed out that the rule laid down in *Chaffee v. United States*, *supra*, did not apply to informations *in rem* against property, which the court says differ widely from 'an action against the person to recover a penalty imposed to punish an offender.' In no other

case which we have been able to find in the Supreme Court reports is the Chaffee case criticised or distinguished in any way. In the Court of Appeals for the Eighth Circuit there is an elaborate discussion of the question, citing many authorities. *U. S. v. Shapleigh*, 54 Fed. 126, 4 C. C. A. 237. In that case the government brought suit to recover the double damages and penalty of \$2,000 prescribed by section 3490, *U. S. Rev. St.* (page 2328, *U. S. Comp. St.* 1901), against any person presenting a false or fraudulent claim against the United States. The conclusion reached was that the government 'might have maintained a civil suit for the single damages it sustained, if any, from the wrongful acts of the defendant without establishing its case beyond a reasonable doubt. But that, when under the form of this civil suit the government sought to punish the defendant for felonies by recovering the penalty of double damages and \$2,000, for each offense, it makes this proceeding criminal in its nature and purpose and invoked the application to it of the rules of evidence applicable to criminal trials."

"The counsel for the government insists that the question was decided adversely to the contention of defendant in *Hepner v. U. S.*, 213 *U. S.* 103, 29 *Supt. Ct.* 474, 53 *L. Ed.* 720, 27 *L. R. A.* (N. S.) 739.

"In the *Hepner* opinion the court is careful to say, more than once, that the certificate states that the evidence was undisputed, which, 'in effect, requires the court to assume as the basis of any answers to the question that, according to the undisputed testimony the government proved the al-

leged violation of law. In such a case there are no facts for the jury to consider.' It may be added that, if there are no facts for the jury to consider, no question of reasonable doubt can possibly arise. We therefore conclude that *Hepner v. U. S.* does not warrant the lower federal courts in disregarding the holding in *Chaffee v. U. S.*, and are of the opinion that *it was error to refuse the request to charge the jury that the government must prove its case beyond a reasonable doubt.*"

The judgment was reversed and sent back for a new trial, and the trial court charged the jury that it must find the defendant guilty beyond a reasonable doubt. The jury returned a verdict for the defendant and the government again sought to raise the same question "on the ground that the action is a civil action, and in respect to procedure and proof is to be treated as such," but the Circuit Court of Appeals, after reviewing the authorities more thoroughly, in its opinion rendered February 10, 1913, replied:

"WE REMAIN OF THE OPINION THAT UNDER THIS ACT, WHICH MAKES THE OFFENSE A *misdemeanor*, THE GOVERNMENT, EVEN WHEN PROCEEDING AGAINST THE DEFENDANT FOR THE PENALTY ONLY, MUST FURNISH THE DEGREE OF PROOF REQUIRED IN A CRIMINAL CASE."

United States v. Regan, 203 Fed. 433.

In addition to the numerous decisions of the Supreme Court and other federal courts cited

in the foregoing opinions, the following cases hold that the action to recover a statutory penalty as a punishment for a crime, is criminal in its nature, and tend to support our contention that proof must be made beyond a reasonable doubt.

Boyd v. U. S., 116 U. S. 616, 29 L. Ed. 746;

Lees v. U. S., 150 U. S. 476, 37 L. Ed. 1150;

Huntington v. Attrill, 146 U. S. 657, 36 L. Ed. 1123,

(where the court held that the test whether a law is penal in its strict and primary sense is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual);

Equitable Life Assur. Soc. v. Com., 113 Ky. 126, 67 S. W. 388;

Coffey v. United States, 116 U. S. 436, 29 L. Ed. 684;

Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239.

The following cases expressly decide the point, and hold that proof must be made beyond a reasonable doubt:

United States v. The Burdett, 9 Pet. 682, 9 L. Ed. 273;

Gilbert v. Bone, 79 Ill. 341;

Atchison T. & S. F. R. Co. v. People, 227
Ill. 270, 81 N. E. 342;

Riker v. Hooper, 35 Vt. 457, 82 Am.
Dec. 646;

White v. Comstock, 6 Vt. 405;

W. H. Small & Co. v. Com., 134 Ky. 272,
120 S. W. 361.

B. The Court Erred in Refusing to Charge the Jury that Their Verdict if for the Government Could Not Exceed One Thousand Dollars. There was but One Act Done, One Offense Committed, and but One Penalty Incurred, and Not Forty-five Offenses Nor Forty-five Penalties.

I. THERE WAS ONLY ONE ACT DONE IS CONCLUSIVELY SHOWN BY THE EVIDENCE.

Without conceding any remote possibility that a verdict could have been properly rendered against the defendant, there was only one offense. The evidence is a unit that the laborers were all engaged by Ruppelius, a subordinate under Carney at best, in Hermosillo, Mexico, *at one and the same time*. They were all gathered together and placed by Ruppelius in a single car, and were transported by rail in that same car until they reached Naco, Arizona; they did not travel by virtue of separate tickets or passes; they rode under *one* pass, procured by Carney without the knowledge or consent or au-

thority of the defendant and against instructions. They were treated by Ruppelius and Carney as *one*. Fed by them together in one lot. In fact, from start to finish it was one shipment by Ruppelius and Carney.

2. UNDER THE STATUTE IN THIS CASE ONE SHIPMENT OF LABORERS CONSTITUTES BUT ONE MISDEMEANOR, AND BUT ONE PENALTY IS INCURRED.

Section two of the statute provides that "the following *classes of aliens* shall be excluded: * * * persons hereinafter called *contract laborers*, etc." It is to be noted that the statute is directed against "*classes*" of aliens, and that in defining the class in question defines contract laborers in the plural and not the singular number. It is directed principally against the importation of large numbers of alien laborers with whom our citizens cannot compete. Numerical strength would shut out the competition of American laborers. The competition of a few isolated alien laborers would hardly be felt, and so the statute permits them to enter the United States when they come to the United States of their own initiative to seek work.

Section four provides that: "It shall be a misdemeanor for any person, etc., in any manner whatsoever to prepay the transportation or in any way to assist or encourage the importation

or migration of any contract laborer or *contract laborers* into the United States, unless, etc." Thus by the express terms of the statute the prepayment of the transportation or other assistance of "contract laborers" (more than one) is "a" misdemeanor, provided it was committed by one act. Of course if the transportation for each was separately prepaid at different times, or if each were assisted at different times, there would be more than one act. But as heretofore shown, they were gathered together at one and the same time, placed in one and the same car, rode under the same transportation, and treated throughout by Carney and his subordinates as but one shipment.

Section 5 provides that for "*every violation*" of section four the person violating the same "*shall forfeit and pay for every such offense the sum of one thousand dollars.*" We have already seen that if by one and the same act forty-five laborers are unlawfully imported it constitutes under section four "a" (one) misdemeanor, which is therefore but one "violation" or one "offense" under section five, and therefore creates but one penalty of \$1000.00 can be collected as a punishment for such act.

The provision that "separate suits may be brought for each alien thus *promised labor or service of any kind*, as aforesaid," does not alter this construction, for to "promise labor or ser-

vice of any kind as aforesaid" is not an offense, and creates no penalty. It merely creates the status of a person as an "alien contract laborer" as defined by section two of the statute. Only "*knowingly assisting and encouraging*, etc., the *importation or migration* of such laborers creates the right to recover the penalty. To permit "separate suits" for each alien "thus promised labor" is to permit a suit for a penalty for merely *promising* "labor or service of any kind." This provision is found among provisions relating solely to procedure, and is in conflict with section four, defining specifically the act condemned and the elements of the offense made "a" misdemeanor. To have it override the section defining the very elements of the offense denominated "a misdemeanor" is not to be sanctioned, for it would create a construction of the statute in conflict with THE GENERAL RULE THAT ONE ACT CANNOT BE SPLIT OR DIVIDED INTO MANY OFFENSES, AND THE PENALTIES THEREBY MULTIPLIED.

Baltimore & Ohio S. W. R. R. Co. v.
United States (220 U. S. 94, 55 L. Ed.
385).

In Baltimore & Ohio S. W. R. R. Co. v. U. S., 220 U. S. 74 (*ante*), this court held that the number of penalties recoverable under the Act of June 20th, 1906 (34 Stat. at L., 607, chap. 3594), making twenty-eight hours the limit of

confinement of live stock in transit without unloading, and prescribing a penalty for "every failure" of the carrier to comply with this provision, is not measured by the number of shipments on the same train, nor is the train the unit of offense, but where the same train contains live stock loaded at *different* periods, one penalty accrues when the period of lawful confinement for the cattle first loaded expires, and other separate and distinct penalties accrue at the time for the lawful confinement of the cattle loaded at later periods successively expires.

A large number of cases were settled by counsel to the effect that one offense "cannot be split into many, and penalties thereby multiplied," and for the sake of brevity we respectfully refer this court to the long list of cases settled by counsel in support of that proposition. That is the general rule of criminal law to apply to the statute at bar unless it affirmatively appears under the statute that Congress intended to split one and the same act into many offenses. Under the twenty-eight-hour law, if only one head of cattle was confined for more than twenty-eight hours, it would equally be a violation of that statute the same as if a large number or even a train load of cattle were confined beyond the twenty-eight hour limit.

In the case of Standard Oil Company of Indiana v. U. S., 164 Fed. 376, decided by the Circuit Court of Appeals for the Seventh Circuit, the famous \$29,000,000 fine case of Judge Landis was reversed for the reason that the lower court had imposed a fine for each of the 1462 car loads of merchandise for which the defendant had unlawfully and knowingly accepted and received a rebate. That action was brought under the "Elkins Act," wherein it was provided as follows:

"That it shall be unlawful for any person, persons or corporation, to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce, * * * whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given, or discrimination is practiced. Every person or corporation who shall offer, grant, or give, or solicit, accept or receive, any such rebates, concession or discrimination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars or more than twenty thousand."

The 1462 carload lots were settled for and the charges thereon paid upon thirty-six distinct

days within that period. The court held that the "transaction of accepting payment by way of rebate was the offense, and not the number of train loads or carloads or pounds of merchandise."

We confess that we see no distinction whatever between payment and receipt of a rebate covering a number of carload lots and the prepayment at one and the same time of the transportation of a number of laborers under the Immigration Act. The facts in the two cases are identical, and the same principle should apply, that where there is but one act done, if the defendant is responsible at all for that act, that there was but one offense, for which the statute provides a penalty of one thousand (\$1,000.00) dollars, and no more.

C. The Instruction Set Forth in the Ninth Assignment of Error is Erroneous and Prejudicial.

- I. THE MERE "INDUCING AND SOLICITING" OF AN ALIEN LABORER FIXES THE STATUS OF THE PERSON AS AN ALIEN CONTRACT LABORER, BUT DOES NOT AUTHORIZE A VERDICT FOR THE PENALTY.

The instruction disjunctively authorized the jury to find against the defendant:

First, if the defendant induced or solicited the

alleged alien, by offers or promises of employment, to migrate to the United States, and the alleged alien did so migrate, *though no assistance in the act of migration was rendered to the alleged alien by the defendant, or,*

Secondly, if the defendant rendered assistance to the alleged alien in the act of migration, though the defendant at such time was ignorant of the status of the laborer as an alien contract laborer.

The first conclusion would be erroneous, for the mere *inducing and soliciting* is not made punishable. Section 2 of the statute provides that if an alien has been induced to migrate by offers or promises of employment his status as a "*contract laborer*" is thereby fixed and defined. His status being first established, section 4 then makes it a misdemeanor to "*prepay the transportation or in any way assist or encourage*" his importation or migration. The words "*prepay the transportation*" being *eiusdem generis*, the words "*assist or encourage*" are controlled by "*prepay the transportation,*" and by construction refer only to similar assistance, to-wit, *material assistance*. Therefore, by a proper construction of the statute, *only the rendering of actual material assistance is made a misdemeanor.*

Now, bearing in mind that this is a penal statute for the punishment of a "*misdemeanor*"

and must be strictly construed, section 5 provides that every person or corporation violating "section four of this act" shall forfeit and pay, etc. Section 4 having defined the crime to be the rendering of material assistance to the alien, section 5 necessarily limits the penalty to one who has rendered such material assistance to a contract laborer. The words "by knowingly assisting, encouraging *or soliciting* the migration" qualify the condition under which the penalty may be incurred, but cannot extend the definition contained in section 4, which does not contain the word "soliciting."

If this construction be correct, the only object of the allegation in the complaint that the defendant "induced and solicited" the migration of the alleged alien, is to allege the status of the alleged alien as a *contract laborer*, upon which alone, however, an action to recover the penalty prescribed could not be based, and *the instruction authorizing such recovery is highly erroneous.*

2. THE INSTRUCTION AUTHORIZED A VERDICT FOR THE GOVERNMENT WITHOUT ANY FINDING OF KNOWLEDGE BY THE DEFENDANT OF THE STATUS OF THE PERSON AS AN ALIEN CONTRACT LABORER.

The latter part of the instruction is disjunctively stated, and authorizes a verdict for the

government without any finding of knowledge by the defendant of the status of the person assisted as an alien contract laborer, which is essential to a recovery as heretofore pointed out.

3. THE INSTRUCTION IS AN ATTEMPT TO EXTEND THE ISSUES RAISED IN THE PLEADINGS, AND IS THEREFORE ERRONEOUS.

The complaint contains no allegation of "knowledge" and the general denial raises no such issue. It is erroneous to submit a pretended issue to the jury not raised by the pleading.

11 Ency. of Pleading and Practice, p. 159, and cases cited.

D. The Instruction Contained in the Eleventh Assignment of Errors is Erroneous.

This error is set out in full on page 159 of the transcript. It was modified by the judge; and as modified is erroneous and prejudicial in that in effect it stated to the jury that although the defendant had *innocently* employed laborers in Arizona who had come in violation of the immigration laws, it was responsible for the penalty sued for. This is not the law. After laborers are already in the United States there is no act which the defendant or anyone else could thereafter do in the United States to assist a migration already completed.

E. The Court Erred in Instructing the Jury that All Acts Performed by Authorized Agents are Binding on the Principal and that the Defendant Corporation would be Responsible for the Penalty Sued for in this Case if It Ratified the Act Charged in the Complaint Against It.

This instruction reads:

"All corporations necessarily act through their officers and agents. All acts performed by duly authorized agents of a corporation are binding upon a corporation. All acts done by agents or servants of corporations, even when without the apparent scope of the authority of such officers and agents, if ratified and acted upon by the corporation with knowledge that such officers, in performing such acts, did so without the direct authority of the corporation, are binding upon the corporation." [Twelfth Assignment of Error, Trans. p. 159.]

It is not the law that "all acts performed by duly authorized agents of a corporation are binding upon a corporation." Such acts, if of a criminal nature, must also be within the *scope of his employment*, and in this case *with actual knowledge* of the corporation, by the express terms of the statute.

Said instruction is further erroneous in that it applies the rule of "*apparent*" authority to this case, which is to recover a penalty as a punishment of the corporation for the commission of a criminal act, a "misdemeanor" by an

alleged agent. It was necessary to show *actual* authority such as could be said to be a direction to the agent to do the unlawful act within the meaning of the criminal rules relating to principal and accessory. The rule of "apparent authority" is applied only in civil relations between parties, and is based on equitable principles of estoppel, which has no place in criminal law.

There can be no ratification of an act made a "misdemeanor" so as to make the person ratifying the same responsible for such act. If the defendant had subsequently ratified the act of Carney in bringing into the United States the forty-five laborers named in the complaint, it would not be responsible for the penalty, any more than it would be guilty of murder if it approved Carney's act in killing some person. The instruction was misleading and prejudicial in the extreme. That a crime cannot be ratified, see

1 Clark & Marshall on Agency, p. 1142;
Morse v. State, 6 Conn. 9;

Wilson v. Barker, 4 B. & Ad. 614.

The only possible theory upon which ratification could be material in this case, is upon the theory that if the defendant had full knowledge of any *previous* acts of Carney outside of the scope of his authority and in violation of his instructions, then it might be said that Carney had

implied acts to thereafter due similar acts. But there being no evidence as a matter of law of any such knowledge, the instruction is not applicable to the evidence, and for that reason also is erroneous.

F. The Instruction Contained in the Fourteenth Assignment is Erroneous and Prejudicial.

It is quite lengthy, so for the sake of brevity we refer to pages 159 and 160 of the transcript for the full substance of this instruction.

The jury were told that it was not necessary that the president, vice-president, general manager, secretary or treasurer "actually and personally" solicited the migration of any of the aliens, nor need the officers and agents *admit* that they knew that the solicitations were made as charged in the complaint, but the jury are told that if "some circumstance" appear that would warrant the "inference" that such officers and *authorized agents* "permitted it to be done," they should find a verdict for the government. Only the governing officers wielding the executive power of the corporation can (as is elsewhere in this brief shown by citation of authorities) of their own initiative charge the corporation with responsibility for their criminal acts. A mere "authorized agent," used in the sense stated in the instruction, cannot of his own initiative do any act or "permit" any act to be done

for which the corporation is criminally responsible.

The court goes even further, and authorizes a verdict for the government if its officers or authorized agents knew that such solicitations "*would LIKELY be made*" and encouraged and permitted the making thereof. This is tantamount to an instruction to find the defendant guilty if they believed that the nearness of Nogales, Arizona, to Mexico was "some circumstance which would warrant the *"inference"* that Carney *"would likely"* violate the law, and Carney did thereafter so violate the law, and that by this act alone the defendant *"encouraged and permitted it to be done.* This would make it impossible, from a practical viewpoint, of patronizing an employment agency without maintaining a sentinel over him at all times. This is not the law, however; the law punishes only a *knowing* violation. The employer is not the insurer under the statute of the lawful conduct of his labor agents. The prohibition is not absolute. The *statute is not directed against "permitting" the commission by others of the offense.* The statute requires *proof beyond a reasonable doubt* of the *misdemeanor* as a punishment for which the penalty is imposed, and not merely "some circumstance which would warrant the inference" that some "agent" knew that a violation of the statute *"would likely be*

made” and “encouraged and *permitted*” the making thereof. Only by such fallacious reasoning could the jury evolve the verdict in this case, and this flagrant and erroneous instruction prompted such reasoning.

G. The Court Wrongfully Refused to Charge the Jury that Carney and C. F. Holler & Co., mere Subordinate Agents, were not Such Agents of the Defendant as to Make the Defendant Responsible for Their Unlawful Acts, Unless the Defendant Participated in, Assented to or Directed the Commission of Such Unlawful Acts.

This is the substance of the instruction contained in the first assignment of error. [Trans. p. 155.] It is applicable to the evidence, which, most favorably viewed, shows that Carney and Holler & Co. were mere subordinate labor agents, incapable of their own will or initiative of wielding the corporate will or policy or doing anything unlawful for which the corporation would be responsible. In order for the corporation to be criminally responsible it was necessary that the corporation, through some of the governing officers capable of exercising the corporate will, either knowingly participated in, directed or assented to the commission. This is the law, as pointed out in Part II of this brief. The defendant was entitled to have the jury so instructed.

Furthermore, there is no evidence that Carney

or Holler & Co. were either governing officers or had any authority, express or implied, to have anything to do with laborers in Mexico, or to in any way assist, encourage or solicit their importation of laborers from Mexico, but, on the contrary, Carney and Holler & Co. were positively forbidden so to do, and were incapable of their own will or initiative of rendering the corporation responsible for their own unlawful acts.

H. The Instruction Requested by Defendant, Set out in the Third Assignment of Error Correctly States the Laws, was Applicable to the Evidence and was Erroneously Refused.

It reads as follows:

"You are instructed that, if you find, from the evidence, that the Mexicans were hired and employed in Nogales, Arizona, to work for the defendant, and after being so hired and employed in Nogales, Arizona, the expenses and transportation of such Mexicans were paid and caused to be paid and furnished by the defendant from Nogales, Arizona, to Naco, Arizona, although such trip was made over a line of railroad running through Mexico, still the prepayment of the transportation by the defendant from Nogales, Arizona, to Naco, Arizona, and the payment of the expenses of the Mexicans upon such trip, under such conditions, is not and was not a violation of the immigration laws."

This instruction was applicable to the evidence for the reason that there was evidence to show that some Mexican laborers (not included among

the forty-five named in the complaint) who entered the United States at the same time at Naco, Arizona, had been hired at Nogales, Arizona, and were shipped by rail through Mexico into Naco, Arizona. Such a course was legal and proper (as shown by the action of the immigration officials in permitting them to enter), and in view of the evidence—the Pearce letter—suggesting that Carney ship laborers from Nogales, Arizona via Naco, Arizona, which would necessarily take them through Mexican territory, the jury may have misconstrued Pearce to have suggested that he ship the 45 laborers named in the complaint *from Mexico* via Naco, Arizona. The jury should have been advised that it was proper to ship laborers hired in Nogales, Arizona, to Naco, Arizona, through Mexican territory. The refusal so to do was manifestly prejudicial to the defendant.

I. The Court Erroneously Refused to Instruct the Jury that if They Find the Defendant Company Instructed Carney Not to Employ, Talk to or Solicit Laborers from Mexico, that the Law Presumed that Such Instructions were Given in Good Faith.

The exact instruction requested is:

“You are instructed that if you find from the evidence that at the time the defendant employed W. W. Carney to secure laborers for it in its construction camp the defendant specially instructed said W. W. Carney not to hire or em-

ploy any laborers within Mexico nor to make any offers or promises of employment to anyone within Mexico, then the law presumed that such instruction was given to said W. W. Carney in good faith, and was to be observed by said W. W. Carney." [Trans. p. 156.]

The evidence as to the giving of the instructions to Carney "not even to talk to a laborer in Mexico" is undisputed. There is no evidence as a matter of law that they were not given in good faith. The law presumes that instructions given by a master to servant not to do an illegal act are in good faith and intended to be rigidly adhered to. (*Com. v. Johnstone*, 2 Pa. Sup. Ct. 317.) This presumption is subject to contradiction, but there being not a scintilla of evidence to the contrary, it was prejudicial error not to so instruct the jury.

J. The Court Erred in Refusing to Instruct the Jury "That the Defendant Could Not Ratify the Unauthorized Act of Any One Pretending to Act as the Agent of the Defendant in the Making of Offers or Promises of Employment in Mexico to Laborers, Unless It had Full Knowledge of the Fact that Such Offer or Promise of Employment had been Made in Mexico."

This instruction is contained in the fifth assignment of error [Trans. p. 157], and was requested on the claim advanced by the government that the defendant had ratified a previous

unauthorized importation of laborers by persons pretending to act for it, and thereby gave such persons implied authority to make similar shipments in the future.

While there is not a scintilla of evidence that the defendant had any knowledge or notice whatever of such previous shipment by Ruppelius, it was entitled to the instruction to the jury requested, to-wit, *that there can be no ratification of previous unauthorized acts without "full knowledge" of such previous acts.*

One cannot be said "to consent to an act of the commission of which he had no knowledge."

McDonald v. Williams, 174 U. S. 397,
406.

VI.

THE SUPREME COURT OF THE TERRITORY OF ARIZONA ERRED IN SUSTAINING THE RULING OF THE TRIAL COURT OVERRULING THE EXCEPTIONS OF THE APPELLANT TO THE APPELLEE'S BILL OF MEMORANDUM OF COSTS, AND ERRED IN SUSTAINING THE JUDGMENT FOR COSTS, AGAINST THE DEFENDANT COMPANY IN THE SUM OF \$2,210.25.

The defendant's memorandum of costs and disbursements is set forth on pages 19 and 20 of the transcript. The defendant's exceptions to the bill of costs is set forth on pages 20 and 21 of

the transcript, and is upon the ground that the same are not authorized by law, as to each and every item thereof.

This action is for the recovery of a statutory penalty as a punishment for a crime, and provides a penalty of one thousand dollars, and contains no provision whatever authorizing the imposing of an additional penalty in the amount of the costs incurred.

It is a rule that in criminal proceedings costs are a creature of statute, and the court cannot award them unless some statute has conferred the power.

U. S. *ex rel.* Phillips v. Gaines, 131 U. S. CLXIX, appx., 25 L. Ed. 733.

It is equally true that at common law costs are not recoverable against the opposite party.

U. S. v. Ringgold, 8 Peters 150, 8 L. Ed. 899;

Antoni v. Greenhow, 107 U. S. 769, 27 L. Ed. 468.

If the defendant company had succeeded in securing a verdict in its favor, the court would have had no power to have taxed costs against the government. The rule should work both ways, and for that reason the government should not have any judgment against the defendant for costs, as the statute creating the penalty con-

tains no such provision, and does not authorize the same.

U. S. v. Verdier, 164 U. S. 213;

Pine River Lodging and Improvement
Company v. U. S., 186 U. S., 46 L.
Ed. 1144.

CONCLUSION.

In conclusion, we respectfully submit:

First. That the complaint in this action is fatally defective for the reason that it fails to allege the element of knowledge, which is essential under the Immigration Act of 1907 to create the penalty imposed.

Second. That the verdict is based on a defective complaint and contains no finding on the essential element of knowledge, and is, therefore, insufficient to support the judgment.

Third. That well settled rules of evidence were flagrantly violated by the lower court, and wholly incompetent evidence and depositions taken without notice were admitted over the defendant's objection, by reason of which the defendant did not have a fair trial, and was wrongfully found guilty.

Fourth. That as a matter of law, the evidence is insufficient to show that the defendant company is responsible for the penalty by reason of the alleged unlawful acts of Carney and his subordinates, who as a matter of law were in-

capable of their own initiative of charging the defendant company with their unlawful acts. The evidence shows as a matter of law that the defendant corporation did not participate in, direct, authorize, either expressly or impliedly, assent to, or have any knowledge whatsoever of the alleged unlawful acts of Carney and his subordinates, but on the contrary, the evidence shows as a matter of law that the defendant company had positively forbidden Carney to commit any of such acts, and that there is no evidence whatsoever that said instructions were not made in absolute good faith and intended to be rigidly adhered to. In short, the evidence shows conclusively that the defendant company is absolutely innocent as a matter of law of any demerit in the transaction charged to defendant.

Fifth. That the instructions given to the jury contained gross misstatements of the law, and among other things, failed to inform the jury that the government should prove the commission of the acts charged against it beyond a reasonable doubt.

Sixth. That the trial court failed to give instructions to the jury which were accurate statements of the law, and applicable to the evidence.

Seventh. That by reason of the errors in refusing to give the instructions to the jury, the defendant did not have a fair trial, and the verdict against it was wrongfully rendered.

Lastly. That there has been a gross miscarriage of justice in this case, and that the judgment is highly erroneous and oppressive in that the property of the defendant corporation is forfeited as a punishment for the commission of a crime in which the defendant company did not participate, and the commission of which it did not consent to, acquiesce in, or have any knowledge whatsoever.

The judgment must be reversed.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

GRANT BROTHERS CONSTRUCTION COMPANY and The United States Fidelity and Guaranty Company of Baltimore, Mary- land, plaintiffs in error, v. THE UNITED STATES.	}	No. 182.
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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF
ARIZONA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

This was a *civil* action to recover \$45,000 as penalties from the appellant under sections 4 and 5 of the immigration act of February 20, 1907 (34 Stat., 898), relating to the importation of alien contract laborers. There was a trial to a jury, resulting in a verdict for the Government (R., p. 17). The case was carried by appeal to the Supreme Court of the Territory of Arizona, which court carefully considered the errors then complained of, and finding them to be without merit, affirmed the judgment below (R.,

p. 137). A motion for rehearing was filed, and denied (R., pp. 148 and 150). The case is now before this court on writ of error.

The assignments of error here, in connection with that writ, are 25 in number. (R., p. 155.) They relate to the giving of certain instructions to the jury and refusing to give others, to the admission of evidence, to the refusal to direct a verdict, to the refusal to grant a new trial, to the refusal to suppress certain depositions, and to the entering of judgment for costs.

The facts are fairly set out in the opinion of the court below (R., p. 137), and need not be repeated here.

Sections 4 and 5 of the immigration act of February 20, 1907 (34 Stat., 898, 900), read as follows:

SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of *any contract laborer* or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act.

SEC. 5. That for *every violation* of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same, by *knowingly* assisting, encouraging, or soliciting the migration or importation of *any contract laborer* into the

United States shall forfeit and pay for *every* such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien *thus promised labor or service* of any kind as *aforesaid*, as debts of like amount are now recovered in the courts of the United States; and *separate* suits may be brought for *each alien* thus promised labor or service of any kind as *aforesaid*. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

Such statutes of the Territory of Arizona as are pertinent are printed as an appendix to this brief, the section numbers in all cases being those of the Revised Statutes of 1901.

BRIEF OF THE ARGUMENT.

THE RECORD.

- I. The lack of any certificate to the record from that court, by the clerk of the trial court bars review here.

The Arizona statute, section 1582 of the Revised Statutes of 1901, requires filing in the territorial Supreme Court on writ of error, of the—

*Original record of the cause, together with a copy of minute entries * * * the same to be certified by the clerk of the District Court, with the seal of the court attached, that it contains a true copy of all minute entries made in the*

case, and the papers thereunto attached are all the papers constituting the record in the case.

No such clerk's certificate is in this record. The certificate of the clerk of the Supreme Court below only assures this court that that which is transmitted here is what was "on file and of record in my office." It gives no assurance that what was on file in his office ever had been filed in the trial court. The recital of a stenographic reporter's certificate, a trial judge's certificate, and the consent of plaintiffs' attorney (R., p. 127) are related only to the "bill of exceptions and statement of fact" (R., pp. 34-127); and are mere recitals of procedure prescribed by sections 1486 and 1491, Arizona Revised Statutes of 1901, which statutes constitute the statement so prepared (*but only when filed*) a part of the record. But the *proof* of the signing and filing lies in the trial clerk's certificate. The result is that the record of the trial court stands here without authentication of any sort, and there is, therefore, nothing to support the assignment of errors. (*Metropolitan Ry Co. v. District of Columbia*, 195 U. S., 322, 329, 330, and cases.)

II. For lack of assignment of error below, only such as are mentioned and considered in the opinion of the territorial Supreme Court are open to review.

Under the Arizona practice, an *assignment of error* is a prerequisite to the consideration of any alleged error. If filed in the trial court, it must be incor-

porated in the transcript filed in the territorial Supreme Court; otherwise, it may be made a part of counsel's brief in that court. (*County of Santa Cruz v. Barnes*, 9 Ariz., 42-49-50; *Turner v. Franklin*, 10 Ariz., 192.)

The record here contains neither any assignment of errors as urged to the appellate court below, nor any brief of counsel there filed. The mere assertion of counsel, and by way of recital (in *some only* of the 25 assignments made in connection with the writ of error from this court), that such an error was assigned in the court below is of no avail.

In a case recently decided upon a writ of error to the territorial Supreme Court of Arizona (*Gila Valley, G. & N. Ry. Co. et al. v. Hall*, No. 68, October term, 1913, decided Jan. 5, 1914), this court said:

At the outset we lay aside certain assignments of error filed in this court that are designed to raise various questions which do not appear, from anything in the record before us, to have been presented to the territorial Supreme Court for its consideration. It is inadmissible for this court to consider errors, not fundamental in their character, which might have been but were not brought under review in the appellate court below; for *it is that court's judgment which is alone* subject to our review. * * *

The local practice required *specific* assignments of error, and treated errors not thus assigned as being waived.

The transcript filed here does not contain the assignments of error below, so that there is

nothing to show what errors were assigned or relied upon in the territorial Supreme Court, except as they receive particular mention in its opinion. Confining our attention to these, etc.

The only matters considered by the territorial Supreme Court in its opinion, in the case at bar, were:

(a) The sufficiency of the evidence to sustain the verdict and judgment holding the defendants below responsible for the violation of the statute by Carney and his associates. (R., pp. 138-144.)

(b) Alleged irregularities in connection with the taking of depositions used in evidence by the plaintiff below. (R., pp. 144-145.)

(c) The admission of the testimony of Carney, his associates and employees.

(d) The admission of the decision of the board of inquiry of the United States Immigration Service. (R., p. 146.)

(e) A casual reference without identification to "numerous" assignments of error, as to the *giving* and *refusal* to give instructions (R., p. 147), *but not to any modifications.*

(f) The taxation of costs.

The motion for rehearing, filed in the court below (R., p. 148), recognizes that there were the six features considered, and it is not claimed as a ground for rehearing that the court had omitted to decide any other points assigned or argued before it.

While insisting that at the very most only items a, b, c, d, and f last above may be considered here,

we nevertheless, under protest, consider the additional assignments argued in the brief of counsel here filed.

ASSIGNMENTS OF ERROR IN THIS COURT.

Assignment No. 25. (R., p. 163.)

Upon *one of several clauses* of this assignment reading—

The Supreme Court of the Territory of Arizona erred in affirming the judgment entered by the trial court against the appellant. (R., p. 163.)

attempt is made to bed a contention that the complaint fails to state a cause of action for lack of averments that the acts complained of were "knowingly" done. (Brief of plaintiff in error, 29, 48, 54.) In bar of this we submit—

1. The general demurrer *was waived*. Defendants' counsel *first* called it to the trial court's attention as still undisposed of, only *after* the jury had been impaneled, and the opening statement had been made by plaintiff's counsel. (R., p. 35 ft.) The court then said it had requested defendants' counsel a week or two before to argue the demurrer. In response to this statement of the court defendants' counsel declared that they never intended to argue the demurrer. The court then announced it was too late to submit it and the demurrer would be regarded as waived. (R., p. 36.) Thus the court, in effect, declared that under the law and practice the demurrer should have been submitted at an earlier stage and

because not so submitted must be deemed to have been waived. It will be presumed that the court correctly observed the practice in that regard. (*Packet Co. v. Sickles*, 19 Wallace, 611, 615, 616.) Moreover, the statutes of Arizona fixing the time "*when a case is called for trial*" as the latest time when any issue of law arising on the pleadings may be submitted and determined (sec. 1390, Ariz. Rev. Stat., 1901), and requiring that all "demurrers not involving the merits of the case shall be determined during the term at which they are filed, if the business of the court will permit" (sec. 1369, Ariz. Rev. Stat., *supra*), show that even a demurrer to the merits must be submitted *not later* than the calling of the case for trial; and as this was not done in this instance the court properly held that the demurrer was waived. So this case stands as if no demurrer had ever been filed to the complaint.

2. Had such an assignment been made in the appellate court below it would have been worthless *because too general*.

It has been too frequently held to require the extended citation of cases, that an exception of *this general character* will not cover specific objections which in fairness to the court ought to have been called to its attention, etc. (*McDermott v. Severe*, 202 U. S., 600-610.)

If to what was contained in those instructions, then * * * arises the further difficulty that *no particular proposition* is called to the attention of the court. (*Clune v. United States*, 159 U. S., 590-594.)

3. The single assignment includes three separate objections, the second of which (rendition of judgment against the surety company) fails both for lack of merit, and because not argued in their brief; and the third is likewise too general. For each of these reasons the whole assignment must fail.

4. Defendants below have estopped themselves from urging this objection here—

(a) by suffering evidence as to their knowledge to be received without objection on the trial, and themselves introducing all their evidence to show lack of knowledge or connection with the unlawful acts of Carney et al. (which was their entire defense).

The case is not to be considered as if before us as on demurrer to the declaration * * *. We must now consider the case as if the declaration had contained a specific averment of the custom, *the proofs having been before the court and jury without objection*, and now making a part of this record. (*Ranner v. Bank of Columbia*, 9 Wheaton, 581-596.)

Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition *so often affirmed* that that is to be considered as done which ought to have been done, may have weight, and the *amendment which ought to have been made to conform the pleadings to*

the evidence may be treated as having been made.
(*Reynolds v. Stockton*, 140 U. S., 266.)

(b) By asking the court to charge that only when knowledge was *proven* could a verdict be returned for plaintiff (R., pp. 12, 13, 14, 16, and 17), thereby admitting that with such evidence of knowledge a verdict for plaintiff could be properly returned.

Whether these allegations were or were not sufficient to allow proof that the collision was the result of a brake so defective * * * we need not stop to consider, because both parties asked instructions upon the theory that the jury were to inquire as to the defectiveness of the brake. (*Baltimore & Potomac Railroad v. Mackey*, 157 U. S., 72, 88.)

(c) By admitting in the territorial Supreme Court that Carney and his associates had *violated the act*, and that *the only question as to the judgment of the trial court was whether it was sustained by evidence connecting them with such unlawful acts*. This admission is set forth in the record in the opinion of the territorial Supreme Court (R., p. 138) in the following language:

It is conceded by the appellant that the provisions of the act in question were violated by Carney and his associates and subordinates, and that in carrying out the contract between him and the Construction Company, Carney and his associates and subordinates, by offers and promises of employment, directly procured the importation and migration of contract alien laborers into the United States, and the record

amply bears out this concession. It is claimed, however, by the appellant that the acts done in violation of the law were the acts of Carney and his associates and subordinates and not the acts of the Construction Company, done without the knowledge, assent, or ratification of the company and for which it is in no way responsible; and that the verdict and judgment of the court is contrary to law in that it is not supported by the evidence.

It is significant that in the motion for a rehearing made in the territorial Supreme Court, while complaining of all of the six questions decided by that court (R., p. 148), there was no suggestion that it had in the above-quoted paragraph *incorrectly stated* (R., p. 138) *the attitude of appellant before it*. See also their assignments Nos. 17, 18, and 21 in this court (R., pp. 161, 162).

It may accordingly be laid down as a broad proposition that one who has taken a particular position deliberately in the course of litigation must act consistently with it. *Bigelow on Estoppel*, 5th ed., 717, 719, 720; and cases *infra*, this brief, subheading *Assignment No. 9*.

5. This case is not criminal in its nature, as counsel would argue, and the cases cited in their brief declaring the rule as to indictments are wholly inapplicable. This court in *United States v. Regan*, No. 503, October term, 1913, decided January 5, 1914, declared that such an action as this "is to be conducted and determined according to the same rules and with the same incidents as are other civil actions."

6. As against the concealment, and the positive refusal to indicate any particular objection to this complaint, deliberately persisted in by the defendants until the preparation of their brief in this court, the averment in the complaint that the acts charged were done "in violation of the act of Congress entitled," etc., should suffice, since the contention of counsel is that unless "knowingly" done the acts could not be in violation of the act.

7. Had the point been presented, the territorial Supreme Court could not properly (in the face of the allegation that the acts were done "in violation of the act," and the admission of all the evidence on the question of knowledge, both for plaintiff and defendant, and the request for charge by defendant on the issue of knowledge; i. e., the complete trial on the theory that the issue was raised) have reversed the cause on such ground.

There shall be no reversal on an appeal or writ of error, nor shall the same be dismissed for want of form, provided sufficient matter or substance be contained in the record to enable the court to decide the cause upon its merits, etc. (Sec. 1588, Ariz. Rev. Stats., 1901.)

And this court has so held in *San Juan L. Co. v. Requena* (224 U. S., 89, 97); *Campbell v. United States* (224 U. S., 99, 106); *Pickett v. United States* (216 U. S., 456, 462,); *Pico v. United States* (228 U. S., 225, 231, 232); See also *Western Stone Co. v. Whalen* 151 Ills., 472, 489); *Pullman Co. v. Cornell* (74 Ills. App., 447, 454); *Morriss Bros. v. Bowers* (105 Tenn., 60, 66).

Assignments 15 (R., 160) and 23 (R., 162).

1. Five separate items of evidence are included in No. 15. Items 3, 4, and 5 (the passes) are not mentioned or considered in the opinion of the appellate court below, and there is no indication in the record that there was any assignment as to them before that court. Because collective, and not well taken as to the passes, the whole assignment fails.

2. Item 2, the record of the board of special inquiry. As to this we submit:

a. The objection to its introduction was that it was "immaterial, irrelevant, and incompetent, no foundation laid therefor, and that the document is not the best evidence," because a "copy of some record and" "not certified as required by law" for such a copy.

We must take issue with the statement of counsel (their brief, p. 78 ft.) that there was a further objection that the "record does not determine the status of these parties." The latter was a mere assertion by a different counsel in an *after* conversation with the court. (R., 37 l. 41 to 44.) After the objection had been interposed it was at once proven that the document offered was the original record. (R., 37 l. 18 to 35); thus obviating all grounds save the general ground first mentioned. A general objection in like words was held insufficient to support assignment of error in *Noonan v. Cal. Mng. Co.* (121 U. S., 393, 400), *Choctaw O. & G. R. R. v. McDade* (191 U. S., 64, 69).

b. At *defendants' request* the court limited its consideration to the single issue of alienage. It was

properly admitted for such purpose. (*U. S. v. Hill*, 124 Fed. 831.)

The fact of alienage is an essential to deportation. And so the finding of the board is conclusive, though not (because of the provisions of the act) on the Secretary of Labor.

It is entirely settled that such an inquiry may be properly devolved upon an executive department or subordinate officials thereof, and that the *findings of fact reached by such officials*, after a fair though summary hearing, may constitutionally be made conclusive, *as they are made by the provisions of the act in question.* (*Zakonaite v. Wolf*, 226 U. S., 275 and cases.)

c. The admission in the appellate court below that Carney et al. had unlawfully imported alien contract laborers, and that they only claimed to be unrelated to those acts, precludes all possibility of injury from any evidence admitted solely to establish alienage.

When a cause is tried on the theory that certain facts exist, even though they are put in issue by the pleadings, their existence will be assumed on appeal. (21 Encly. Pl. and Pr., 667, 668, and cases.)

And the court will resort to the record below to determine the position there taken. (21 Encly. Pl. and Pr., 669.)

3. Item 1, the oral testimony of Carney et al.

a. The testimony of five witnesses in its entirety is the subject of this item of assignment 15. Much of it was competent. Outside of the objections urged

there was no attempt in their brief here to comply with the second paragraph of subdivision 2 of rule 21 of this court by *quoting the full substance* of the evidence admitted. (Their brief, pp. 29, 92.) We refuse to search through the record to locate and analyze the various many separate questions, objections, exceptions, and answers that might possibly be claimed as within the scope of this assignment. A casual examination of the record (pp. 47 to 50) in the case of one witness shows that very much of the testimony of the general nature now complained of went in without any objection at all, and if any was so admitted this item fails. The specification and assignment should have been to some specific question, with its particular objection, exception, and answer.

b. That the testimony generally was relevant and competent is amply demonstrated by the following excerpt from the opinion of the court below:

It is further urged that the trial court erred in admitting in evidence statements made by the associates and employees of Carney, on the ground that such statements were hearsay and not binding upon the defendant company. The agreement between Carney and the construction company contemplated that Carney should have the assistance of others in procuring laborers for the construction company, as in the conversation at the time of the making of the agreement it was stated that Carney intended to open offices in various cities along the Mexican line, and it was known to the construction company that

Carney had no office in Arizona. The plaintiff upon the trial had two things to prove—first, that the importation of contract laborers into the United States *as* had been assisted or encouraged, and that as a result of such assistance and encouragement such laborers had migrated to the United States; and, secondly, that the defendant had knowingly assisted or encouraged such migration or importation. To prove the first fact it was proper to show the solicitation and representations made to the laborers to induce them to migrate to the United States, and that in fact it was such statements and solicitations that caused them to come. Therefore, the statements of Carney and of his assistants were material and relevant as showing the acts done by them in pursuance of the contract between the construction company and Carney. The evidence was not received, as seems to be claimed by the appellant, to establish the extent of the authority of the agent of the corporation, but to show the illegality of the migration of the laborers, and that one of the inducements to the laborers to come was that such acts had been done on behalf of the construction company. Such statements were admissible, not as evidence of the agent's authority, but to show the acts which the agents did in the course of their employment. The fact that the evidence may also have tended to show knowledge on the part of the construction company does not, under the doctrine of multiple admissibility, render the evidence inadmissible because it may have tended to show such

knowledge. The trial court did not err in receiving the evidence complained of. (R., p. 146.)

4. Items 3, 4, 5. The three railroad passes (Exhibits Nos. 2, 10, and 11, R., 129 and 130) partially covered the transportation of the aliens involved in this suit (and others) from a point in Mexico to the United States. This transportation was either issued or arranged for by Carney, the labor agent of the company, and two of the passes *were charged* to "*account Grant Bros. Con. Co.*" (R., 45, 53, 54, 61, 64, 67, 74, 76, 103, 133.)

Neither Carney nor his associates paid for any of this transportation, and the only fair inference from the facts was that it had been paid for by the only other party interested, to wit, the appellant in this case. Such evidence was therefore competent to go to the jury on the question of the knowledge of the company.

As well said by the court below (R., p. 143):

* * * In a case of this character, where the evidence of knowledge must depend upon the facts and circumstances as testified to by the witnesses, and where direct evidence of knowledge or intent is not obtainable by the plaintiff, it is often impracticable to select any particular fact or circumstance from the record which shall in itself establish the ultimate fact sought to be reached, whereas a number of circumstances, each one insufficient in itself to establish the fact, may, when taken to-

gether, lead, and correctly lead, to the conclusion that the fact has been established.

* * *

In *Moore v. United States* (150 U. S., 57, 60), it was said:

* * * As intimated in the case of *Alexander v. United States*, 138 U. S., 353, where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it *manifestly appear* that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors. There are many circumstances connected with a trial, the pertinency of which a judge who has listened to the testimony, and observed the conduct of the parties and witnesses, is better able to estimate the value of than an appellate court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter. It was said by Mr. Justice Clifford, in delivering the opinion of this court in *Castle v. Bullard* (23 How., 172, 187), that "when- ever the necessity arises for a resort to circum-stantial evidence, either from the nature of the inquiry or the failure of direct proof, objec- tions to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connec- tion with each other." * * *

See also *Clune v. United States* (159 U. S., 590, 593), and *Williamson v. United States* (207 U. S., 425, 451.)

5. Assignment 23. The depositions.

a. Much of the argument here is to the point that, the cause being criminal in its nature, depositions could not be used. (Their brief 103 to 105.) Of course this court's decision in *U. S. v. Regan*, supra, adversely disposes of that contention. Furthermore, not only was such a contention never made to the appellate court below, but it was not a ground of the motion to suppress (R., p. 8) which is the sole basis for assignment 23. (R., pp. 76, 162.)

b. The only specific ground of the motion is that the notices which were served upon appellant, to the effect that application would be made to the clerk of the above-entitled court for a commission to take the depositions, were irregular in that said notices were entitled "In the District Court of the *Second* Judicial District," when in fact the case was pending in the "*First* Judicial District."

On this point the record shows that the suit was originally instituted in the second judicial district, but upon application of the company, defendant below, the suit was transferred to the first judicial district. (R., p. 4 and 21.) As pointed out by the court below (R., p. 145), the defendant *knew* that application for a commission to take the depositions of witnesses could only be made to the clerk of the court to which

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the case had been transferred; and, it further appearing that defendant filed no cross interrogatories, it is plain that, even if the irregularity complained of could in any aspect constitute error, it was entirely harmless, and for that reason will not be considered by this court. (*Agnew v. United States*, 165 U. S., 36, 44). The irregularity was a mere formal one and did not prejudice plaintiff in error.

c. Appellant waived the irregularity.

The indorsement on the inclosing envelope shows that the depositions were "opened at the request and in the presence of A. C. Baker, attorney for defendants." The statutes of Arizona gave either party the right to have *depositions* opened, and to use them as evidence (secs. 2521 and 2522, Rev. Stat., 1901). That being so, if appellant intended to rely upon the irregularities in taking as forbidding their being treated or used as depositions, he should not have taken the benefit of a statute applicable *only* to *depositions* to have them opened for his inspection—they being taken not upon his application, but that of the Government. He must now be held to have waived his right to object. (*Killian v. Augusta R. R. Co.*, 78 Ga., 749, 751, 752.)

Under the rule contended for by appellant, it could reserve its right to object to them as not amounting to *depositions* until it had caused them to be opened and their contents made known. If appellant, after seeing them, did not desire to use them as depositions in its own behalf (sec. 2522, Rev. Stat. Ariz., 1901), it could, according to the

logic of its contention, successfully urge they should not be treated or used as depositions on account of the irregularities in taking, and prevent their use by the Government; and this notwithstanding the fact that plaintiffs in error knew or were chargeable with notice, of the irregularity when it caused the opening of the depositions.

Had there been error however, it would have been without injury. Aside from proof of the citizenship of each witness, the testimony was limited to dealings with Holler & Co., Rupelius & Sanchez (R., p. 76, 79, 81, 85, 86), who were associates of Carney. Plaintiff in error admitted, at least in the appellate court below, that Carney and his associates had violated the law and incurred its penalties. Hence the evidence merely proved that which was admitted; and also was cumulative.

d. The only possible injury even claimed by counsel (their brief 106) is that they furnished the only *competent* proof that the deposing witnesses were aliens. This assumes that the admission of the bureau record was error and that they had preserved the right to complain of it here. Independent of this, however, their attitude and admissions before the appellate court below forbade their being injured by evidence of alienage.

Assignments 17 and 18. (R., p. 161.)

Counsel devotes 117 pages of their printed brief (pp. 107-224) to the contention that the evidence

fails to sufficiently connect them with the unlawful acts of Carney and his associates, to allow the judgment or verdict to stand. This contention was referred to and considered in the opinion of the appellate court below. So far as the argument is bedded upon assignment 18 (the motion for verdict), because this motion was made at the close of plaintiffs' case and because defendants thereafter put in their evidence and never renewed the motion at the conclusion of all the evidence, the action of the trial court in denying that motion can not be assigned as error. (*Union Pacific R. R. Co. v. Callaghan*, 161 U. S., 91-95; *Hansen v. Boyd*, 161 U. S., 397.) This court has applied the above rule in a case originally brought in the territorial District Court and removed here by writ of error from the territorial Supreme Court of Oklahoma. (*McCabe & Stein Co. v. Wilson*, 209 U. S., 275-276.) Therefore, in the absence of a special statute of Arizona providing otherwise, the last case should be controlling. Apparently the only statute of Arizona in any manner referring to nonsuits is section 1397, Arizona Revised Statutes, 1901, which authorizes a *voluntary* nonsuit on trial.

It would be idle within the fair limits of this brief to follow counsels' labored discussion of the evidence. They cling to the fallacious idea that this case is a criminal one and insist on applying the measure of proof to the evidence accordingly. They demand proof beyond a reasonable doubt, and ingeniously blind themselves to the probative force of circumstantial evidence.

The appellate court below gave most careful consideration to this question and its analysis of the evidence and its probative effect is a clear and most convincing refutation of the contentions of plaintiff in error in this regard. And without quoting it in the brief we adopt as our own argument that portion of the opinion of the appellate court below, dealing with this question. (R., pp. 139-144).

Assignment No. 18. The alienage feature as to 35 counts.

Counsel argue this in their brief, pages 225 to 237, inclusive. In opposition we submit:

(a) The assignment upon which they attempt to bed this argument only assigns error in the ruling upon the general motion as to the whole case. It does not in any manner refer to the later separate motions as to each of the 35 counts. (R., pp. 161-162.) It can not, therefore, be related to these later motions.

(b) Because the motion not renewed at the close of all the evidence, it could not be urged as error.

(c) No such assignment or contention was made to or considered by the court below.

(d) Unless they prevail as to item 2 of assignment No. 15 (the bureau record), they fail here because the latter would furnish evidence of alienage.

(e) They have confessed the fact of alienage below.

THE INSTRUCTIONS.

Assignments 1 to 14, inclusive (R. pp. 155-160).

Counsel used seven pages of their brief (228-234) to convince themselves that the court should have applied the rule requiring proof of the issue "beyond a reasonable doubt." In answer we merely again refer to *United States v. Regan, supra*.

Assignment of error No. 6.

They use seven more pages (234-240) in arguing that the importation of 45 laborers made them liable to but a single penalty. The vice of this contention lies in the fact that section 5 of the act violated authorizes separate suit for *each* alien promised labor or service. The complaint in the present case contained 45 counts, each count covering a different alien. Furthermore, the question appears to be set at rest by the ruling of this court at the present term in No. 439, *M., K. & T. Ry. Co. v. United States*, decided November 10, 1913, in which it is said:

The statute makes the carrier who permits *any* employee to remain on duty in violation of its terms liable to a penalty for *each* and every violation. The *implication of these words* can not be made much plainer by argument.

Assignment No. 2 is not specified in the brief and neither it nor assignments Nos. 7, 8, and 13 are argued; nor is assignment No. 10 argued save on the question of proof beyond a reasonable doubt. These assignments, then, will not be considered. There remain Nos. 1, 3, 4, 5, 9, 11, 12, and 14.

Nos. 1, 3, 4, 5 relate to the refusal of requests. All save No. 4 were sufficiently covered in the court's charge and hence were properly refused. (*Indianapolis, etc., R. R. Co. v. Horst*, 93 U. S., 291-295; *Erie R. R. Co. v. Winter*, 143 U. S., 60-75.)

[The matter embraced in the refused request made the subject of assignment No. 1 (R., p. 155) is found in the court's charge. (R., l. 23 to 37, p. 122.) That which is the subject of assignment No. 3 (R., p. 156) is so found. (R., p. 123, l. 17 to 27.) That which is the subject of assignment No. 5 (R., p. 157) is so found. (R., p. 122, l. 15 to 22; and p. 122, l. 36-37.)]

The matter made the subject of assignment No. 4 (R., p. 156) was properly refused. It did not apply the maxim "*Omnia rite acta*," etc., because it omitted to tell the jury that the presumption was a *prima facie* one only or that it could be overcome by evidence to the contrary. If given, it would have withdrawn the whole issue of good faith (in giving the direction to the agent) from the jury.

The following utterance of this court, made with reference to a statute, is equally applicable to an instruction dealing with other than a conclusive presumption:

So also it must not under guise of regulating the presentation of evidence *operate to preclude the party from the right to present its defense to the main fact thus presumed.*

Luria v. United States (231 U. S., 26); also, *Catts v. Phalen* (2 How., 376, 381.)

Assignments Nos. 9, 11, 12, 14.

These are leveled against certain portions of the instructions *given* to the jury. The instructions, read as a whole, as pointed out by the appellate court below, "fully and fairly stated the law in the case." (R., p. 147.) Reversible error can not be predicated upon a showing that a certain part of the instructions, when read apart from their connection, need qualification. (*Evanston v. Gunn*, 99 U. S., 660, 667; *Spring Co. v. Edgar*, 99 U. S., 645, 659.)

Assignment No. 9: The charge quoted was excepted to and error was assigned to it *only in its entirety*. It stated four distinct propositions, viz: (1) If the conditions recited in the first 13 lines (R., p. 158) appeared, they must find for the Government; or (2) if the condition recited in the next 2½ lines appeared, they must find for the Government; or (3) if the condition recited in the next 2½ lines appeared, they must so find; or (4) if the condition recited in the next 5 lines appeared, they must so find. If any one of these propositions be correct, the assignment fails.

When we look at the instructions contained in these various paragraphs we see that in many of them there are two or more different *propositions of law*, and that a general exception taken to *any of such paragraphs* would be insufficient if one of the several propositions were correct. (*Holloway v. Dunham*, 170 U. S., 615-620; see also *McDermott v. Severe*, 202 U. S., 610-611.)

It may be observed that the objection to the instruction containing the particular words complained of was general in its nature. The instruction embodied some propositions of law to which no objection could be properly made, and it was the duty of the defendant to point out specifically the part of the instruction which it regarded as announcing an erroneous principle of law. (*Baltimore & Potomac R. R. v. Mackey*, 157 U. S., 72, 86; *Newport News & M. V. Co. v. Page*, 158 U. S., 38, 40; *Union Pacific R. R. v. Callaghan*, 161 U. S., 91-95.)

Passing to the objections as if separately and specifically assigned,

It is urged that no penalty is incurred for merely "soliciting and inducing," because these words are not used in section 4 of the act (34 Stat., 898). We answer: (1) That section 2 excludes "persons * * * who have been *induced* or *solicited* to migrate," etc. (R., p. 138), and the words "assist or encourage" in section 4 are broad and include inducing and soliciting, for certainly the latter actions "encourage" the migration; (2) the use of the word "*soliciting*" in the phrase—

* * * for every violation of any of the provisions of section 4 of *this* act, * * * by knowingly assisting, encouraging, or *soliciting*—," etc. (Sec. 5.)

is an express declaration that soliciting is a violation of the provisions of section 4, and the argument of plaintiffs in error for strict construction as of a criminal statute is unsound; (3) the plaintiffs in error

themselves asked the trial court to charge that "inducing or soliciting" amounted to a violation of the penal provisions of the act, and the court gave one such request, so that they may not be heard to make the objection. (R., pp. 13, 16, 17.)

"To this objection *it is* a conclusive answer that the defendants themselves prayed for an instruction substantially like that given." (*Philadelphia, etc., R. R. Co. v. Howard*, 13 How., U. S., 343; *B. & P. R. R. v. Mackey*, 157 U. S., 88.)

And finally (5) they expressly conceded, throughout the trial and at least in the appellate court below, that Carney and his subordinates had incurred the penalty by violation of the penal provisions of the act, only insisting that they (the plaintiffs in error) were innocent and in no wise related to the violations proven (R., pp. 107, 108, 138). Therefore they are not concerned with, but are estopped from here inquiring what would amount to a violation of the act by Carney et al.

It may accordingly be laid down as a broad proposition that one who * * * has taken a particular position deliberately in the course of a litigation must act consistently with it. (*Bigelow on Estoppel*, 5th ed., 717, 719, 720.)

Where a cause is tried upon the theory that certain facts *exist*, even though they are put in issue by the pleadings, *their existence* will be *assumed on appeal*.

21 *Encly. Pl. & Pr.*, 667-668, and cases cited.

See also 17 *Am. & Eng. Encly. Law*, 2d ed., 447, 448.

Balt. & Potomac R. R. v. Mackey, 157 U. S., 72, 88.

Davis v. Wakelee, 156 U. S., 680, 689.

Camden v. Brady, 1 Black, 62.

Canton Rolling Mch. Co. v. Rolling Mill Co., 155 Fed., 321.

Brown v. Gurney, 201 U. S., 184, 190.

The court will resort to the record below to determine the question of the position taken below. (21 Encly. Pl. & Pr., 669.)

To the suggestion that knowledge that "Acuna" was an alien contract laborer was not made essential, we answer:

(1) The word "knowingly" following the requirement in the *opening clause*, that the jury find Acuna was an alien, a laborer, etc. (which clause in detail meets fully the definition of an alien contract laborer), requires knowledge of that fact. And this is emphasized by the use of the word "said" before "Benito Acuna" in all the later clauses.

(2) The last five lines of this charge could be wholly omitted without impairing its legal sufficiency, and so the omission therefore of the word "knowingly" is wholly immaterial.

(3) The jury are definitely told in folio 269 (R., p. 123) that *before they can convict* they must find that a responsible representative of the defendant corporation "*knowingly* assisted, or *knowingly* encouraged, or *knowingly* caused others to assist or encourage or solicit the migration of an *alien Mexican contract laborer* into the United States."

Assignment No. 11. (R., p. 159.)

The modification is a mere paraphrase of the next preceding sentence in the charge, which was given at the request of the plaintiffs in error. (R., p. 123, l. 17-27; and p. 16.)

Assignment No. 12. (R., p. 159.)

The matter here complained of is almost verbatim and is, in substance, what plaintiffs in error asked the court to charge. (R., p. 13, l. 19-24.) It is also a correct statement of the law. In spite of their own request counsel have attacked the charge on their mistaken theory that the case is a criminal case.

Assignment No. 14. (R., pp. 159, 160.)

Counsel's attack here is based on the theory that the rules of evidence applicable to criminal cases should have been announced. This was a legitimate application of the rule of circumstantial evidence to the case on trial; and no tangible objection to the law declared has been suggested.

Assignment No. 24. (R., pp. 162, 163.)

This challenges the action of the court in entering judgment for costs. This was a civil suit, and the Territorial statutes of Arizona (sec. 1543, Revised Statutes, 1901), provide that "the successful party to a suit shall recover of his adversary all the costs expended or incurred therein, except where it is or may otherwise be provided by law." Section 2639, Revised Statutes of Arizona, 1901, provides that "in

all cases, civil and criminal, the costs shall be taxed against the losing party." It is therefore clear that the costs were properly taxed. The attack is wholly on the theory that this action is a criminal one. (Their brief, pp. 252-254.)

The suggestion that no cost judgment should be rendered against them because none could have been rendered against the Government had they prevailed, i. e., that the right should be reciprocal, is specious but unsound. The Government's exemption is an attribute of sovereignty. This contention was set at rest by this court in *United States v. Verdier* (164 U. S., 213, 219).

Assignment No. 25. (R., p. 163.)

There is no merit in the contention that the Supreme Court of the Territory erred in rendering judgment against the surety on appeal. The supersedeas bond given by appellant and his surety was conditioned for the prosecution of the appeal and the performance of the judgment, and section 1592, Revised Statutes of Arizona, 1901, provides that the Supreme Court of the Territory, in case of affirmance, shall render judgment against appellant and his sureties.

This practice was approved in *Hopkins v. Orr* (124 U. S., 510, 514-515).

CONCLUSION.

We submit, therefore:

1. That, because of the conditions of this record, this writ is limited to a consideration of the five features definitely mentioned and decided in the opinion of the appellate court below.

2. That the claim of error as to each of those is without merit.

3. That were they subject to consideration here, there is no merit in the additional grounds of assigned error, argued by counsel in their brief.

4. That the cause was fairly tried, fairly reviewed in the territorial Supreme Court, and its judgment should be affirmed.

WILLIAM WALLACE, Jr.,
Assistant Attorney General.

JANUARY, 1914.

APPENDIX.

EXTRACT FROM ARIZONA REVISED STATUTES, 1901.

SEC. 1369. Pleas to the jurisdiction, pleas in abatement, and other dilatory pleas and demurrers not involving the merits of the case shall be determined during the term at which they are filed, if the business of the court will permit.

SEC. 1390. When a case is called for trial the issues of law arising on the pleadings, and all pleas in abatement and other dilatory pleas remaining undisposed of shall be determined, and it shall be no cause for the postponement of trial of the issue of law that a party is not prepared to try the issues of fact. * * *

SEC. 1486. (Sec. 277.) Either party to a suit may, if he so desire, make the oral evidence given in the case a part of the record of the case, either by a statement of facts, or, at his election, by causing the court reporter's notes of the trial to be extended by him, and duly certified over his hand as being a full, true, and correct copy of all the questions propounded to jurors and witnesses and their answer thereto, as well also all remarks, rulings, opinions, and judgments given and rendered during the trial thereof by the judge presiding at the trial, and that it contains all the oral evidence given in the case; but in no case shall such extended notes contain a copy of any written evidence, depositions, exhibits, or arguments of counsel. When thus made, certified, and filed, it shall constitute a part of the record of the case.

1491. (Sec. 282.) After the trial either party may, at any time during the term, or within the time stipulated, or within such reasonable time as shall be allowed by the court by an order for such purpose made and entered, tender to the opposite attorney a statement of facts, which must, in narrative form, contain all the evidence given in the case, but without repetition, prolixity, or uncertainty. On its receipt by the opposite attorney he shall, within a reasonable time, not to exceed ten days in any case, unless the time be extended by a written stipulation duly signed and filed, return it to the one who tendered or caused it to be tendered, together with a written statement signed by him, wherein he shall agree that the same is true and correct, or he shall state that it is not correct, specifying where it is faulty and setting forth such changes and amendments as he may deem necessary to make it correct; and thereupon such statement of facts and the agreement thereto of the opposing attorney, or the changes and amendments suggested, shall be presented to the trial judge, who shall either certify thereto that the same is true and correct and sign such certificate, or first correct it as it may require and then add his certificate thereto and sign it. Failure on the part of the attorney to whom the statement of facts is tendered to agree to the correctness thereof or to suggest changes or amendments thereto within the time above specified shall be deemed an admission of its correctness. When so certified, signed, and filed, it shall become a part of the record of the case.

1543. The successful party to a suit shall recover of his adversary all the costs expended or incurred therein, except where it is or may be otherwise provided by law.

1592. Whenever the supreme court, on the trial of a cause brought from any inferior court shall affirm the judgment or decree of such inferior court, or when said court shall proceed to render such judgment or decree as should have been rendered by the court below, and such judgment shall be for the same or a greater amount, or of the same nature as rendered in the court below, said court shall render judgment against the appellant or plaintiff in error and his sureties on the appeal bond, a copy of which shall always accompany the transcript of the record; and said supreme court shall, in their discretion, also include in their judgment or decree such damages, not exceeding 10 per cent on the amount of the original judgment, as the court may deem proper; and the judgment or decree of said court rendered as contemplated in this section shall be final.

2521. Depositions after being filed may be opened by the clerk or justice at the request of either party or his counsel, and the clerk or justice shall indorse on such depositions upon what day and at whose request they were opened, signing his name thereto, and they shall remain on file for the inspection of either party.

2522. Either party shall have the right to use the depositions on the trial.

GRANT BROTHERS CONSTRUCTION CO. v.
UNITED STATES.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF
ARIZONA.

No. 182. Argued January 21, 22, 1914.—Decided March 16, 1914.

Errors alleged to have been committed by the trial court which do not involve anything fundamental or jurisdictional must be regarded as waived if they were not presented to the Supreme Court of the Territory.

An action by the United States to recover penalties under the Alien Contract Labor Law is civil and attended with the usual incidents of a civil action. *United States v. Regan, ante*, p. 37.

Where an action for penalties was tried on the theory that the defend-

ant was not liable unless the violations were knowingly committed and the jury returns a verdict against the defendant after being charged that knowledge is an essential element of the cause of action, the petition, if omitting an allegation of knowledge, can be regarded as amended to conform to the facts, the defendants not being prejudiced thereby.

It is most unreasonable to reverse a judgment for a defect in pleading by which the defendant has been in no way prejudiced.

The trial court was right in refusing to suppress depositions because the notices in regard to taking them were defective in certain respects which could not and did not mislead the parties.

While, as a general rule, a judgment binds only the parties and their privies, a judgment in a prior action may be admissible against a stranger as *prima facie*, although not conclusive, proof of facts which may be shown by evidence of general reputation—such as alienage.

The decision of a board of special inquiry that certain persons were aliens was properly admitted in a suit by the United States to recover penalties for violations of the Alien Contract Labor Act, as *prima facie* evidence of the alienage of the persons before the board.

In this case, it appears from the evidence that there was proof other than of the acts of the professed agent to show his agency, and there was also sufficient testimony to make it a question for the jury to determine whether the instructions given by the defendant to its agent not to violate the Alien Contract Labor Act were given in good faith.

Under the Alien Contract Labor Act a separate penalty shall be assessed in respect of each alien; and this is so notwithstanding all the aliens for whose employment penalties are asked were brought into the United States at one time. *Missouri, Kansas & Texas Ry. Co. v. United States*, 231 U. S. 112.

There was no error in this case in rendering judgment against defendants for costs.

13 Arizona, 388, affirmed.

THE facts, which involve the validity of a judgment obtained by the United States for penalties for violation of the Alien Contract Labor Law, are stated in the opinion.

Mr. Isidore B. Dockweiler, with whom Mr. A. C. Baker and Mr. Robert B. Murphy were on the brief, for plaintiffs in error:

The statute is highly penal and must be strictly construed so as to bring within its condemnation only those

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who are shown by direct and positive averments in the complaint to be embraced within the terms of the law.

Although this action is civil in form, it is in fact in the nature of a criminal proceeding in that it seeks to recover a penalty for the commission of a crime. *United States v. Edgar*, 45 Fed. Rep. 46; *United States v. M'Elroy*, 115 U. S. 252; *United States v. Gay*, 95 Fed. Rep. 226; *United States v. Tsokas*, 163 Fed. Rep. 129; *Regan v. United States*, 183 Fed. Rep. 293; *Lees v. United States*, 150 U. S. 476; *United States v. Hepner*, 213 U. S. 103; *United States v. Stevenson*, 215 U. S. 190.

For the distinction between remedial and penal statutes see *Huntington v. Attrill*, 146 U. S. 657; *Brady v. Daly*, 175 U. S. 153; 2 Bishop's New Crim. Law, par. 504; *Dunbar v. United States*, 156 U. S. 185; *United States v. Scott*, 74 Fed. Rep. 213; *United States v. Mitchell*, 141 Fed. Rep. 666; *State v. Williams*, 139 Indiana, 43; *State v. Waterbury*, 133 Iowa, 137; *State v. Root*, 94 App. Div. 84; *Rex v. Lawley*, 2 Stra. 904.

Knowingly, when applied to an act or thing done, imports knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing. *Rosen v. United States*, 161 U. S. 29; *Price v. United States*, 165 U. S. 311; *Verona Cheese Co. v. Murtaugh*, 50 N. Y. 314; *Driskill v. Parish*, 7 Fed. Cases, 1100; *Darnborough v. Benn*, 187 Fed. Rep. 580; *United States v. Craig*, 28 Fed. Rep. 795; *United States v. Borneman*, 41 Fed. Rep. 751; *Rex v. Hayes*, 23 Can. L. T. 88, 5 Ont. L. Rep. 198; *State v. Davis*, 14 R. I. 281; *Pettibone v. United States*, 148 U. S. 209; *United States v. Terry*, 42 Fed. Rep. 317, 318; *United States v. Kirby*, 7 Wall. 482; *United States v. Claypool*, 14 Fed. Rep. 127; *Dunbar v. United States*, 156 U. S. 185; *United States v. Koplik*, 155 Fed. Rep. 919; *United States v. Highleyman*, 26 Fed. Cas., No. 15,361; *United States v. Janke*, 183 Fed. Rep. 277; *Blakely Bank v. Davis*, 135 Georgia, 687; *Robinson v. State*, 6 Ga. App. 696;

State v. Bridgewater, 171 Indiana, 1; *State v. Smith*, 18 N. H. 91; *Gregory v. United States*, 17 Blatchf. 330; *Clark & Marshall, Crimes*, par. 55; *McDonald v. Williams*, 174 U. S. 397, 406; *Felton v. United States*, 96 U. S. 699; *Potter v. United States*, 155 U. S. 538; *Yates v. Jones' Natl. Bank*, 206 U. S. 158; *St. Louis & S. F. R. Co. v. United States*, 169 Fed. Rep. 69; *St. Joseph Stock Yards Co. v. United States*, 187 Fed. Rep. 104; *United States v. Beatty*, 24 Fed. Cas. 14,555; *State v. McBarron*, 66 N. J. L. 680; *Utley v. Hill*, 155 Missouri, 232; *State v. Smith*, 119 Tennessee, 521.

None of the forty-five counts of the complaint contains any allegation that the defendant knowingly assisted, encouraged or solicited the migration or importation to the United States of the person named in each count, or that the defendant knew at the time that such person was an "alien contract laborer" as defined by the statute. Cases *supra*; *Ledbetter v. United States*, 170 U. S. 606; *United States v. Cook*, 17 Wall. 168, 174; *United States v. Cruikshank*, 92 U. S. 542, 558; *United States v. Carll*, 105 U. S. 611; *United States v. Simmons*, 96 U. S. 360; *United States v. Hess*, 124 U. S. 483; *Evans v. United States*, 153 U. S. 584.

Failure to allege an essential element of a statutory offense is fatal, can be taken advantage of at any time, and is not cured by verdict. *Supreme Lodge v. McLennan*, 171 Illinois, 417.

This ground is not one which is waived even by failure to demur, so it is obvious that it was not waived by consent that it be overruled. *Evans v. Gerken*, 105 California, 311; *Morris v. Courtney*, 120 California, 63; *United States v. Carll*, 105 U. S. 611; 1 Bishop's New Crim. Pro., par. 123, sub. 3; *Teal v. Walker*, 111 U. S. 242; *Kentucky Ins. Co. v. Hamilton*, 63 Fed. Rep. 93.

It was error to admit the minutes of the Board of Special Inquiry showing that at a meeting of that board the la-

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borers were excluded from admission to the United States as alien contract laborers.

Defendant was not a party to, or present, or represented at, and had no notice of, the *ex parte* hearing of the board whose summary order the Government seeks, in this case, to introduce against it. *United States v. Sing Tuck*, 194 U. S. 161. *United States v. Hills*, 124 Fed. Rep. 831, is not a valid authority in this case. See *Pearson v. Williams*, 202 U. S. 281; *Lee Sing v. United States*, 180 U. S. 488; *Leggate v. Clark*, 112 Massachusetts, 308.

The order of the special board of inquiry is not competent as a public record. *Naanes v. State*, 143 Indiana, 299; *Dewey v. Algire*, 37 Nebraska, 6.

For cases in which coroners' verdicts have been held to be incompetent, see *State v. Turner*, Wright, 20; *Wheeler v. State*, 34 Oh. St. 394, 398; *Colquit v. State*, 107 Tennessee, 381; *Memphis & C. R. Co. v. Wombach*, 84 Alabama, 149; *Hollister v. Cordero*, 76 California, 649; *Rowe v. Such*, 134 California, 573; *Germania Ins. Co. v. Ross-Lewin*, 24 Colorado, 43; *Central Railroad v. Moore*, 61 Georgia, 151, 152; *State v. Commissioners*, 54 Maryland, 426; *Supreme Council v. Brashears*, 89 Maryland, 624; *Wasey v. Insurance Co.*, 126 Michigan, 188; *Cox v. Royal Tribe*, 42 Oregon, 365.

The courts below erred in permitting evidence as to the making of offers and promises of employment to Mexicans in Mexico, and in permitting witnesses to testify to acts of assistance and encouragement rendered by them to the Mexicans in their migration from Mexico into the United States, and also in admitting the passes.

An agency, or the extent of an agency, or the authority of an agent, cannot be proven by the acts and declarations of the person professing authority to act as such agent. *United States v. Boyd*, 5 How. 29; *Regan v. United States*, 183 Fed. Rep. 293.

The *ex parte* depositions taken by the Government

should have been suppressed. A commission issued without notice having been served is void. *Harris v. Wall*, 7 How. 695; *Kline Bros. v. Insurance Co.*, 184 Fed. Rep. 969; *Knobe v. Williamson*, 17 Wall. 587; *Buddicum v. Kirk*, 3 Cr. 293; *W. U. Tel. Co. v. Collins*, 45 Kansas, 94; *Garner v. Cutler*, 28 Texas, 183; *Indiana Pub. Co. v. Ayer*, 34 Ind. App. 284.

The use of depositions in an action to recover a penalty as a punishment for a criminal act was improper and infringed on defendant's constitutional right to be confronted by the witnesses, and the defendant was prejudiced thereby. *Rulofson v. Billings*, 140 California, 252.

Verdict for defendant should have been directed.

A trial court may direct a verdict for one party to an action whenever, upon all the evidence, a contrary verdict, if rendered by the jury, would have to be set aside as unjustified and unsupported by the evidence. *Ryder v. Wombwell*, L. R. 4 Exch. 39; *Giblin v. McMullen*, L. R. 2 P. C. Apps. 335; *Improvement Co. v. Munson*, 14 Wall. 448; *Parks v. Ross*, 11 How. 373; *Merch. Bk. v. State Bk.*, 10 Wall. 637; *Hickman v. Jones*, 9 Wall. 201; *Estate of Morey*, 147 California, 495.

The governing officers of the defendant, and they only, should be regarded as the corporation in determining whether the defendant corporation knowingly assisted, encouraged or solicited the migration or importation of any alien contract laborers. *Lake Shore R. Co. v. Prentice*, 147 U. S. 101; *Hollard v. Vinton*, 105 U. S. 7; *Hindman v. First National Bank*, 98 Fed. Rep. 562; *Denver & Rio Grande Ry. Co. v. Harris*, 122 U. S. 597; *Salt Lake City v. Hollister*, 118 U. S. 256; *Philadelphia, W. & B. R. R. Co. v. Quigley*, 21 How. 202; *United States v. Kelso*, 86 Fed. Rep. 304, 306; *State v. Morris E. R. Co.*, 23 N. J. L. 360; *Regina v. Gt. N. of Eng. Ry.*, 58 E. C. L. 315; *Commonwealth v. Proprs. of New Bedford Bridge*, 2 Gray, 339.

The distinction between the civil liability of a corpora-

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tion for the acts of its servants and agents, and the criminal liability of a corporation for the criminal acts of its servants or agents is important in this case.

A master or principal is not liable criminally for the criminal acts of his servant or agent unless he directed, assented to or acquiesced in such illegal acts.

If the master does not aid or abet, countenance or approve, or have knowledge, of the act of his servants, it is the general rule that he cannot be punished criminally therefor. *Taylor v. Nixon* (1910), 2 I. R. 94; *Rex v. Huggins*, 2 Ld. Raym. 1574; 2 New Am. & Eng. Enc. Law & Pr. 834; 20 Am. & Eng. Ency. Law, 176 (2d ed.); 26 Cyc. 1545; 1 Clark & Marshall, Agency, 1140; Mechem, Agency, par. 746; 88 Am. St. Rep. 797; *Hoover v. Wise*, 91 U. S. 311; *Whitton v. State*, 37 Mississippi, 379; *Anderson v. State*, 22 Oh. St. 305; *Commonwealth v. Nichols*, 10 Met. 259; *Commonwealth v. Junkin*, 170 Pa. St. 194; *Cushing v. Dill*, 2 Scammon (Ill.), 460; *Cushman v. Oliver*, 81 Illinois, 444; *Satterfield v. West. Un. Tel. Co.*, 23 Ill. App. 446; *State v. Balti. & Ohio R. R. Co.*, 15 W. Va. 362; *Hall v. Nor. & West. R. Co.*, 44 W. Va. 36; *Williams v. Hendricks*, 115 Alabama, 277; *State v. Bacon*, 40 Vermont, 456; *Parks v. People*, 49 Michigan, 333; *Whitecraft v. Vander- ver*, 12 Illinois, 235; *Nall v. State*, 40 Alabama, 262; *Seibert v. State*, 40 Alabama, 60; *Spokane v. Patterson*, 46 Washington, 93; *Hipp v. State*, 5 Blakf. (Ind.) 149.

In this case the guilty knowledge of the defendant company is an essential ingredient of the offense. The general rule applies that the master is not criminally responsible unless he participates in, authorizes or consents to the unlawful act. The exception to the rule in cases where knowledge is not an essential element of the offense has no application to the present case. *St. Louis & S. F. R. Co. v. United States*, 169 Fed. Rep. 69; *Felton v. United States*, 96 U. S. 699; *United States v. Beatty*, 24 Fed. Cas. 14,555; *Chisholm v. Doullton*, 22 Q. B. D. 736;

Verona Cheese Co. v. Murtaugh, 50 N. Y. 314; *Coubon v. Muldowney* (1904), 2 Irish Law Reports, 498; *State v. Smith*, 10 R. I. 258; *State v. Hayes*, 67 Iowa, 27; *Taylor v. Nixon* (1910), 2 I. R. 94; *Williams v. Hendricks*, 115 Alabama, 277; *Patterson v. State*, 21 Alabama, 571.

There is no evidence in the case at bar which can justify or support a verdict for the Government involving a finding that the defendant construction company knowingly induced, assisted, encouraged or solicited, or caused to be induced, assisted, encouraged or solicited, the migration or importation of any of the forty-five laborers named in the complaint.

The majority of laborers engaged in railroad construction work in Arizona are of Mexican descent.

It was proper and lawful for anyone to employ, in the United States, Mexican citizens who had migrated to the United States, whether of their own accord, or whether they had been unlawfully induced to come by the acts of others, not known to the employer.

There is no evidence that defendant's contract with Carney authorized or contemplated any violation whatever of the immigration act; the undisputed evidence shows that it gave strict orders not to assist, encourage or solicit the importation or migration of any laborers from Mexico, and not to even talk to laborers in Mexico.

The positive and specific instructions given to Carney were given in absolute good faith. There is no evidence to the contrary. This is the only conclusion which can be drawn from the evidence as a matter of law.

The knowledge contemplated by the statute, essential to be proven in the case at bar, is actual knowledge, and not constructive knowledge or notice of facts which, upon inquiry, would lead to actual knowledge.

There is no evidence that any of defendant's officers had any actual knowledge of the illegal acts of Carney and others acting under him.

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There is no evidence that the defendant itself furnished conveyance or transportation, or paid any of the expenses of said laborers from Mexico to the United States.

Proof of the alienage of each and every of the forty-five laborers named in each of the forty-five counts respectively of the complaint was essential under the statute. There was no proof as to thirty-five. The mere fact that the laborers were of Mexican descent is no proof that they were born in Mexico.

As the act makes the offense a misdemeanor, the Government, even when proceeding for the penalty only, must furnish the degree of proof required in a criminal case. *United States v. Regan*, 203 Fed. Rep. 433; *Boyd v. United States*, 116 U. S. 616; *Lees v. United States*, 150 U. S. 476; *Huntington v. Attrill*, 146 U. S. 657; *Equitable Life Assur. Soc. v. Commonwealth*, 113 Kentucky, 126; *Coffey v. United States*, 116 U. S. 436; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265; *United States v. The Burdett*, 9 Pet. 682; *Gilbert v. Bone*, 79 Illinois, 341; *Atchison, T. & S. F. R. Co. v. People*, 227 Illinois, 270; *Riker v. Hooper*, 35 Vermont, 457; *White v. Comstock*, 6 Vermont, 405; *W. H. Small & Co. v. Commonwealth*, 134 Kentucky, 272.

The court erred in refusing to charge the jury that their verdict if for the Government could not exceed one thousand dollars. There was but one act done, one offense committed, and but one penalty incurred, and not forty-five offenses nor forty-five penalties.

Under the statute one shipment of laborers constitutes but one misdemeanor, and but one penalty is incurred. One act cannot be split or divided into many offenses and the penalties thereby multiplied. *Balt. & Ohio S. W. R. R. Co. v. United States*, 220 U. S. 94; *Standard Oil Co. v. United States*, 164 Fed. Rep. 376.

The mere inducing and soliciting of an alien laborer fixes the status of the person as an alien contract laborer, but does not authorize a verdict for the penalty.

The instruction authorized a verdict for the Government without any finding of knowledge by the defendant of the status of the person as an alien contract laborer.

The instruction is an attempt to extend the issues raised in the pleadings, and is therefore erroneous. 11 Ency. Pl. & Pr., p. 159.

One cannot be said to consent to an act of the commission of which he had no knowledge. *McDonald v. Williams*, 174 U. S. 397, 406.

It was error to award judgment for costs against the defendant. *Phillips v. Gaines*, 131 U. S. CLXIX, appx.

At common law costs are not recoverable against the opposite party. *United States v. Ringgold*, 8 Pet. 150; *Antoni v. Greenhow*, 107 U. S. 769; *United States v. Verdier*, 164 U. S. 213; *Pine River Co. v. United States*, 186 U. S. 279.

Mr. Assistant Attorney General Wallace for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

In an action of debt, tried to the court and a jury, in one of the district courts of the Territory of Arizona, the United States recovered a judgment against the Grant Brothers Construction Company, a California corporation, for the prescribed penalty of \$1,000 for each of forty-five alleged violations of § 4 of the Alien Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898; and upon an appeal to the Supreme Court of the Territory, the judgment was affirmed. 13 Arizona, 388. The construction company and the surety upon its supersedeas bond then sued out this writ of error, claiming that divers errors had been committed by the trial court which should have been, but were not, corrected by the appellate court.

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The portions of the statute upon which the action was founded are as follows:

"SEC. 2. That the following classes of aliens shall be excluded from admission into the United States: . . . persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled; . . . *And provided further*, That skilled labor may be imported if labor of like kind unemployed cannot be found in this country: *And provided further*, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants.

* * * * *

"SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this Act.

"SEC. 5. That for every violation of any of the provisions of section four of this Act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his

own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

The petition contained forty-five counts, each charging, with considerable detail, that the defendant, by offers and promises of employment and by providing transportation and paying expenses, assisted, encouraged and solicited the migration and importation into the United States from Mexico of a designated alien laborer who was not within the terms of either of the last two provisos in § 2 of the statute. A different alien laborer was named in each count, and the date of the offending act was given in all as October 29, 1909.

In a preliminary way, the evidence tended to show these facts: The construction company was building a line of railroad in southern Arizona, near Naco, a town on the international boundary. Laborers in large numbers were required for the work, and in August, 1909, the company employed one Carney to procure laborers for it and to take them to the vicinity of the work. For this he was to be paid one dollar in gold for each laborer secured and twenty cents for each meal provided while they were en route. It was contemplated that he would arrange with others to aid him, and he secured the assistance of Holler, Rupelius and Randall, who, like himself, were located at Nogales, another boundary town. Under this employment Carney procured, and the company accepted, prior to the transaction in question, about 450 laborers, 95 per cent. of whom were Mexicans. Many of these came across the line on their own initiative and were then engaged by Holler, but a substantial number were engaged in Mexico

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by Rupelius and then brought into the United States at Nogales. Only a few days before the transaction in question, Rupelius gathered together 80 or 90 in Mexico and induced them to enter the United States at Nogales by promising that the construction company would employ them, which it did.

As respects the 45 laborers named in the petition there was evidence tending to show the following: These men were citizens of Mexico and were unskilled laborers who were not within the exemptions specified in the last two provisos in § 2 of the statute. They were secured at Hermosillo, Mexico, by Rupelius, October 28, 1909, were brought into the United States, at Naco, by Randall the next day, were there taken into custody by an immigration inspector, and were examined before a board of special inquiry. The board found that they were alien contract laborers, ordered that they be excluded, and notified them of the order and of their right to an appeal. After consulting with the Mexican Consul at Naco they waived that right, and most of them were returned to Mexico, a few being detained as witnesses. Rupelius had induced them to leave Hermosillo and come into the United States by offers and promises of employment by the construction company. They were brought to Naco upon a railroad pass procured by Carney and purporting to have been issued on account of the construction company, and their only meal en route was provided by Holler at Carney's suggestion. During the latter part of their journey they were in charge of Randall, who had been directed by Carney to deliver them to McDonald, an agent of the construction company, who was expected to be at Naco to receive them. McDonald was there, having come in from one of the company's camps that day. He endeavored to hasten the proceedings before the board of inquiry in order that he might get the men out to the camp that afternoon, and also provided a meal for them while the proceedings

were in progress. This was the first party of Mexicans that Carney had attempted to bring into the country at Naco. Others had been brought in at Nogales. According to his statement, the inspection officers at the latter place had been particularly liberal in admitting Mexican laborers procured for the construction company; and he suggested to the inspectors at Naco that like action on their part would be appreciated, but the suggestion did not find favor with them.

There were some direct contradictions in the evidence, different portions gave rise to opposing inferences, and parts of it were more or less improbable; but as it was the province of the jury to pass on such matters, which it did by the verdict, they require no other notice than they will receive presently.

As several of the alleged errors, not involving anything fundamental or jurisdictional, were not presented to the appellate court for consideration, they must be regarded as waived and will be passed without further notice. *Montana Railway Co. v. Warren*, 137 U. S. 348, 351; *Gila Valley Railway Co. v. Hall*, ante, pp. 94, 98.

It is complained that the trial court permitted the Government to read in evidence the depositions of absent witnesses, instructed the jury to return a verdict for the Government if the evidence reasonably preponderated in its favor, and in other ways treated the case as civil in substance as well as in form. But the trial court was right. An action such as this is civil and is attended with the usual incidents of a civil action. *United States v. Regan*, ante, p. 37.

The petition did not allege that the acts charged against the construction company were knowingly done, and it is said that this operated to render the recovery erroneous. No doubt the petition was defective. A right to the penalty arises only where § 4 is violated "by knowingly assisting, encouraging or soliciting the migration or impor-

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tation" of an alien contract laborer into the United States. Knowledge being an element of what is penalized, it must be included in the statement of a cause of action for the penalty. But there are reasons why the defect did not render the recovery erroneous. The defect was not pointed out in the trial court. On the contrary, the case was tried as if the omitted allegation were in the petition. Both parties introduced evidence bearing upon the company's knowledge, both presented requests for instructions treating it as an essential factor in the case, and the jury was instructed upon that theory. In its charge the court said that before any verdict could be returned for the Government it must appear from the evidence that some representative of the defendant company, for whose act it would be responsible, "knowingly assisted or knowingly encouraged or knowingly solicited or knowingly caused others to assist or encourage or solicit the migration or importation of an alien Mexican contract laborer into the United States." And again: "Where knowledge is an essential ingredient of a cause of action, the existence of the knowledge becomes a question to be determined by the jury, upon a consideration of all the facts and circumstances in the case." It is therefore quite plain that the jury found from the evidence that the acts charged against the defendant were knowingly done, and the petition may well be treated as amended to conform to the facts. *Ariz. Rev. Stat. 1901, §§ 1288, 1293; Reynolds v. Stockton*, 140 U. S. 254, 266. The defendant was in no wise prejudiced by the defect, and to make it a ground for reversing the judgment, notwithstanding the theory upon which the trial proceeded, would be most unreasonable. *San Juan Light Co. v. Requena*, 224 U. S. 89, 96; *Campbell v. United States*, *Id.* 99, 106.

Complaint is made of the denial of a motion to suppress certain depositions, subsequently read in evidence, which the Government had taken under a commission issued by

the clerk. The only ground for the motion to which our attention is invited is that the preliminary notice described the case as pending in the second district when it was pending in the first. The case had been brought in the former, and was transferred to the latter at the defendant's instance. The notice and accompanying interrogatories were prepared before and served after the transfer. The purpose of the notice was to inform defendant's counsel of the intended application for a commission and of the proposed interrogatories and to give opportunity for filing cross-interrogatories. See Ariz. Rev. Stat. 1901, §§ 2507, 2513. No cross-interrogatories were filed in either district, and after the expiration of the time allowed for them the clerk of the district in which the case was pending issued the commission. Counsel for the defendant could not have been misled or confused by the error in the notice, for they were fully informed of the transfer, having perfected it the day before the notice was served. In these circumstances the trial court, as also the Supreme Court of the Territory, held that the error was inconsequential and did not require the suppression of the depositions. We perceive no reason for disturbing that conclusion. On the contrary, we think it was plainly correct.

Over the defendant's objection, the decision of the board of special inquiry was admitted in evidence as tending to prove that the 45 men were aliens, and it is said that this was error because the defendant was not a party to the proceeding. One of the questions committed by law to the board for decision, subject to an appeal to the Secretary of Commerce, was whether the men were aliens. The document admitted in evidence disclosed that, after a hearing, the board determined that question in the affirmative, and that the men acquiesced by waiving their right to an appeal. In that way their status as aliens was conclusively established as between themselves and the United States. It is true that the defendant was not a

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party to that proceeding, and that as a general rule a judgment binds only the parties and their privies. But it is equally true that a judgment in a prior action is admissible, even against a stranger, as *prima facie*, but not conclusive, proof of a fact which may be shown by evidence of general reputation, such as custom, pedigree, race, death and the like, and this because the judgment is usually more persuasive than mere evidence of reputation. 1 Starkie Ev. 386; 1 Greenleaf Ev., §§ 139, 526, 555; *Patterson v. Gaines*, 6 How. 550, 599; *Pile v. McBratney*, 15 Illinois, 314, 319; *McCollum v. Fitzsimons*, 1 Rich. (So. Car.) 252. In principle, alienage is within the latter rule, and so the board's decision was properly admitted in evidence for the purpose stated.

Considerable evidence was admitted, over the defendant's objection, of the acts and declarations of Carney and his assistants while they were procuring laborers in Mexico and bringing them into the United States, and it is contended that this was violative of the rule that the acts and declarations of a professed agent are not admissible to prove the existence or extent of his agency. See *United States v. Boyd*, 5 How. 29, 50. But the contention rests upon a misconception of what the record discloses. This evidence was not admitted to establish the agency or its extent, but to show that the laborers came into the United States in circumstances which rendered their migration or importation unlawful. Whether the defendant was responsible for what was done was another question. The trial court recognized this and expressly ruled that the agency must be otherwise shown, and we agree with the territorial courts in thinking there was other evidence tending to prove the agency and that it embraced what was done.

The evidence disclosed that when the arrangement was made with Carney, and on one or two occasions thereafter, he was in terms instructed not to engage any laborer

in Mexico and not to induce or assist any laborer to migrate thence into the United States, and because of this it is said that the evidence afforded no basis for holding the defendant responsible for the acts of Carney and his assistants in inducing and aiding the migration or importation of the laborers named in the petition. In dealing with this point the courts below held that under the evidence as a whole it was an admissible conclusion that the instructions to Carney were not given in good faith or were in effect abrogated by acquiescence in their non-observance. An examination of the evidence as set forth in the record satisfies us that it afforded reasonable support for either of these conclusions and therefore that the question was properly one for the jury. And upon looking at the court's charge as incorporated into the record we find that the matter was fairly and adequately submitted.

Although conceding that there was evidence that ten of the men were citizens of Mexico, the company claims that there was no evidence of the alienage of the other thirty-five. It must be held otherwise. Not only did the decision of the board of inquiry constitute such evidence, but it was distinctly testified by some of the men, who became witnesses at the trial, that "they were all Mexicans," meaning thereby, as the context shows, that they were all citizens of Mexico.

Still another contention is that as all the men named in the petition were brought into the United States at one time there was but a single violation of the statute and only one penalty could be recovered. The statute declares that "separate suits may be brought for each alien thus promised labor or service," and this plainly means that a separate penalty shall be assessed in respect of each alien whose migration or importation is knowingly assisted, encouraged or solicited in contravention of the statute. See *Missouri, Kansas & Texas Ry. Co. v. United States*, 231 U. S. 112.

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The action of the court in rendering judgment against the defendant for the costs is challenged, but this was so clearly right as to render discussion of it unnecessary. Ariz. Rev. Stat. 1901, §§ 1543, 2639; *Kittredge v. Race*, 92 U. S. 116, 121; *United States v. Verdier*, 164 U. S. 213, 219.

As we find no prejudicial error in the record, the judgment is

Affirmed.